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TRAVERS V. JONES: IS "FACT PRECLUSION" A DEATH KNELL FOR SECTION 1983 EMPLOYMENT CLAIMS AGAINST LOCAL GOVERNMENTS BY CIVIL SERVICE EMPLOYEES?

William J. Linkous, III*

INTRODUCTION

On March 11, 2003, a three-judge panel of the Eleventh Circuit Court of Appeals decided the case of *Travers v. Jones*.[1] By itself, the holding of the Eleventh Circuit in *Travers* is not particularly noteworthy given its solid reliance on U.S. Supreme Court and Georgia court precedent.[2] However, when coupled with other binding employment law principles in the Eleventh Circuit, the case restricts the ability of civil service employees to bring duplicative litigation against local governments, particularly when these employees seek leverage through multiple avenues of relief.[3] Although the court in *Travers* did not do away with Section 1983 employment litigation for civil service government employees, its holding relegates litigants to a choice of one or two more limited roads and presents potential pitfalls for local governments.[4] However, the public policy benefits of the decision should vastly outweigh any problems.

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1. 323 F.3d 1294 (11th Cir. 2003).
2. *See generally id.*
3. *See* Bishop v. City of Birmingham Police Dep't, 361 F.3d 607 (11th Cir. 2004).
4. *Travers*, 323 F.3d at 1296-97.

I. CASE FACTS AND HISTORY

A. *Prior to Litigation*

James Travers, the plaintiff in the *Travers* case, worked as a civil service employee for the Fire and Emergency Services Department in DeKalb County Georgia.[5] At that time, Fire and Emergency Services employees were concerned about what they described as a "pay disparity" issue in their department and began to picket outside of the county's main administration building.[6] At some point during the pickets, the employees began to loudly "chant" the first name of DeKalb County's Chief Executive Officer ("CEO"), Vernon Jones.[7] There was no evidence that prior to the day in question the CEO had ever heard this chanting.[8] The Fire and Emergency Services Department had never disciplined an employee for picketing, nor had it disciplined an employee for taking a position on the "pay disparity" issue.[9] In other words, there was no evidence of any history of retaliation against employees for the expression of their First Amendment rights.

On the date at issue, Mr. Travers was the lone firefighter picketing outside the building.[10] When DeKalb's CEO emerged from the building, Mr. Travers began chanting the CEO's first name.[11] The CEO heard Mr. Travers and approached him.[12] There was a verbal exchange, the exact wording of which the parties dispute.[13] Mr. Travers admitted removing his sunglasses during the exchange.[14] The CEO then left the area.[15] Later, Fire Chief Scott Wilder received notice of this incident, and after investigating and hearing Mr.

5. *Id.* at 1295.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Travers*, 323 F.3d at 1295.
11. *Id.* at 1296.
12. *Id.*
13. *Id.* at 1296-97.
14. *Id.* at 1296.
15. *Id.*

Travers' side of the story, he suspended Mr. Travers from duty without pay for 30 days.[16] Mr. Travers appealed Chief Wilder's decision through DeKalb County's Merit (civil service) System.[17]

DeKalb County's Merit System generally affords employees the opportunity to contest disciplinary measures against them by presenting evidence to a county appointed administrative hearing officer.[18] These hearing officers are ordinarily attorneys selected from the community who have no prior interest in the cases they hear.[19] The Merit System rules allow the hearing officers to overturn the decision of the supervisor only when one of the following conditions apply: (1) the decision was "based upon an error in fact," or (2) was motivated by a non-job-related factor.[20] The administrative hearing allows employees to present evidence, testify on their own behalf, cross-examine witnesses for the county, and make arguments.[21] However, the proceedings do not afford the employees or the county the opportunity to subpoena witnesses.[22] Hearing officers must issue written decisions, containing the findings of fact, conclusions, and the grounds for the decision.[23] Merit System employees may also seek review of actions against them that they consider discriminatory.[24] The provisions governing discrimination appeals are generally similar, but a hearing officer can overturn these decisions only if (1) the decision was "based on error of fact," or (2)

16. *Travers*, 323 F.3d at 1296.

17. *Id.*

18. *See generally* DEKALB, GA., CODE §§ 20-1 to 20-195 (1976) (containing basic provisions of DeKalb County Code) (on file with author); DEKALB, GA., CODE §§ 1001-1058 (1996) (providing local acts applicable to DeKalb County) (on file with author); ADMINISTRATIVE PROCEDURES TO THE PERSONNEL CHAPTER OF THE DEKALB COUNTY CODE (2000) (on file with author).

19. DEKALB, GA., CODE § 20-193(2) (1976) (on file with author); ADMINISTRATIVE PROCEDURES TO THE PERSONNEL CHAPTER OF THE DEKALB COUNTY CODE, Art. XVI, §§ 1055-56.

20. DEKALB, GA., CODE § 20-193(3) (1976) (on file with author).

21. DEKALB, GA., CODE § 20-193(2) (1976) (on file with author); ADMINISTRATIVE PROCEDURES TO THE PERSONNEL CHAPTER OF THE DEKALB COUNTY CODE, Art. XVI, §§ 1055-56.

22. Employees may request the presence of county employees as witnesses five days or more before the hearing. The hearing officer can only notify these employees that a party has requested their presence, but the officer cannot compel their attendance under the current administrative procedures. *See Travers*, 323 F.3d at 1297.

23. DEKALB, GA., CODE § 20-193(4) (1976) (on file with author).

24. DEKALB, GA., CODE § 20-194 (1976) (on file with author).

the decision "was motivated by intentional discrimination" against the employee based upon one of the listed protected classifications.[25]

Mr. Travers' appeal under the county Merit System was unsuccessful.[26] He failed to request the presence of his county employee witnesses five days or more before the hearing date, as the procedures require, and thus, the failure of the witnesses to appear did not delay his hearing.[27] The County did not present the CEO's testimony but relied instead on the testimony of the other two county officials present for the incident.[28] As quoted by the Eleventh Circuit, the hearing officer made the following written findings regarding the incident in question:

> Travers was participating in a picket demonstration in front of the administration building. As CEO Jones exited the building, Travers turned to him and repeatedly chanted Jones's first name in a "loudly, menacingly and taunting manner." CEO Jones approached Travers and asked whether he was a County employee. Travers acknowledged that he was a County employee exercising his rights as a citizen. CEO Jones told Travers that while he did not mind that Travers was exercising his rights, he would not tolerate Travers' insubordinate actions. Travers then said that he needed to take off his sunglasses so that he could look into CEO Jones's eyes. CEO Jones repeated that he would not tolerate Travers' insubordinate actions and walked away.[29]

The hearing officer also found that there were no non-job-related factors or any errors of fact that would warrant reversing Chief Wilder's 30-day suspension of Mr. Travers for insubordination and conduct unbecoming of civil service employees, regardless of

25. DEKALB, GA., CODE § 20-194 (1976) (on file with author).
26. *Travers*, 323 F.3d at 1296.
27. *Id.* at 1297.
28. *Id.* at 1296.
29. *Id.* (a copy of the hearing officer's decision is on file with author).

whether they are on or off duty.[30] Mr. Travers did not appeal the decision of the hearing officer via Georgia's certiorari procedure or any other method.[31]

B. Litigation

Mr. Travers instead filed a lawsuit in the United States District Court for the Northern District of Georgia, alleging that the decision to suspend him violated his rights under the First Amendment and 42 U.S.C. § 1983.[32] Mr. Travers also included duplicate claims under the Georgia Constitution.[33] The defendants in the case were CEO Jones, in both his individual and official capacities, Chief Wilder, in both his individual and official capacities, and DeKalb County.[34] Mr. Travers alleged that the motivation behind his suspension was suppression of his First Amendment rights to freedom of expression, freedom of association, and freedom to petition.[35]

The defendants filed their motion for summary judgment at the close of discovery. Citing the case law discussed in detail below, the defendants contended that the Merit System hearing officer's decision precluded any additional findings of fact in the case as to certain key issues.[36] The defendants argued that the hearing officer's recitation of the facts mandated judgment in their favor.[37] Alternatively, the defendants argued that even if the hearing officer rejected the preceding argument, it should still grant summary judgment to all defendants.[38]

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30. *See id.*
31. *See id.* at 1297.
32. *Travers*, 323 F.3d at 1295.
33. *Id.*
34. *Id.*
35. *Id.*
36. *See generally id.* at 1294-97.
37. *Id.*
38. The defendants based their theories in this regard upon both law and fact. *Travers*, 323 F.3d at 1298. CEO Jones argued that the court should dismiss him in his individual capacity because he was not the decision-maker regarding Travers' suspension and because there was no evidence that he played any part in the discipline. *Id.* at 1297-98. Chief Wilder argued that there was no evidence to support Travers' claim that Travers' speech, association, or petition motivated him to discipline to Travers. Both defendants in their individual capacities also argued that the court should grant them qualified immunity. DeKalb County argued that Chief Wilder's decision could not result in county liability because the

In his response to the defendants' motion for summary judgment, Mr. Travers argued that the factual findings of the Merit System hearing officer would not preclude additional findings by the court even if the court gave him a fair opportunity to litigate the issues.[39] He also argued that the administrative hearing officer did not provide him with the opportunity to subpoena witnesses at the administrative hearing.[40] He argued, in turn, that his inability to subpoena witnesses was a fatal flaw that kept him from having a fair opportunity to litigate the issues before the hearing officer because (1) he was unable to bring in the additional witnesses who, he claimed, would have changed the outcome, and (2) he did not have the opportunity to cross-examine CEO Jones.[41]

The district court granted partial summary judgment to the defendants.[42] The Court granted the defendants' motion on the claims against Wilder and Jones in their official capacities.[43] It also granted summary judgment regarding the claims made under the Georgia Constitution.[44] However, the court denied summary judgment on all of the remaining claims.[45] Although the defendants moved for reconsideration, the court also denied the defendants' motion for

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hearing officer reviewed his decision, and thus, even if the suspension was improper, it was not a policymaking decision for DeKalb County pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The defendants charged in their "official capacity" also argued that the court should dismiss them because the claims against them were duplicative of those against DeKalb County. Finally, the defendants argued that the court should dismiss all claims made pursuant to the Georgia Constitution. *Travers*, 323 F.3d at 1294.

39. *Travers*, 323 F.3d at. at 1296.

40. *Id.* at 1297.

41. *Id.*

42. *See* Travers v. DeKalb County, No. 1:01-CV-1734-RLV (N.D. Ga. June 18, 2002) (order granting partial summary judgment) (on file with author).

43. *Travers*, 323 F.3d at 1295.

44. *See* Travers v. DeKalb County, No. 1:01-CV-1734-RLV, at 15 (N.D. Ga. June 18, 2002) (order granting partial summary judgment) (on file with author).

45. *See id.* at 5-15.

reconsideration.[46] The individual defendants then filed an automatic appeal of their denial of qualified immunity to the Eleventh Circuit.[47]

C. *The Eleventh Circuit's Panel Decision*[48]

1. *Background*

Prior to the Eleventh Circuit's decision in *Travers*, significant federal and state court decisions suggested that the doctrine of fact preclusion may apply to administrative decisions in Georgia that a court had not yet reviewed.[49] This legal framework evolved between 1966 and 2002 in both federal and Georgia courts.[50] The fact preclusion doctrine developed from the doctrines of res judicata and collateral estoppel.[51] A short discussion of the relevant case law in both federal and state court is warranted.

a. *Federal Law*

A number of significant decisions between 1966 and 1994 laid the underpinnings for the application of fact preclusion in the context of Section 1983 litigation.[52] In *United States v. Utah Construction &*

46. Although the motion for reconsideration did not address the issues that the Eleventh Circuit ultimately decided, the district court did address them to a certain extent in its order. *See* Travers v. DeKalb County, No. 1:01-CV-1734-RLV (N.D. Ga. June 18, 2002) (order on motion for reconsideration) (on file with author).

47. *See* Courson v. McMillian, 939 F.2d 1479, 1486 (11th Cir. 1991); Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1508 (11th Cir. 1990); Hudgins v. City of Ashburn, 890 F.2d 396, 402 (11th Cir. 1989).

48. Initially, the Eleventh Circuit denied a motion to dismiss the appeal by Travers but granted a motion by the defendants to stay the proceedings below pending appeal. The matter quickly approached trial because the district court denied the defendants' request to stay the remaining claims against the county pending appeal and because Travers would not consent to a stay of the proceedings below.

49. *See infra* Part I.C.1.a-b.

50. *See generally* Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); Maniciia v. Brown, 171 F.3d 1364 (11th Cir. 1999); Gjellum v. City of Birmingham, 829 F.2d 1056 (11th Cir. 1987); Butler v. Turner, 555 S.E.2d 427 (Ga. 2001); Gwinnett County Bd. Tax Assessors v. Gen. Elec. Capital Computer Serv., 538 S.E.2d 746 (Ga. 2000).

51. *See* Univ. of Tenn. v. Elliott, 478 U.S. 788 (1986).

52. *See generally* Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 499 U.S. 90 (1980); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966).

Mining Co.,[53] the Supreme Court decided an "[a]ction by a government contractor for increased costs and damages."[54] The Court held that, although certain administrative findings on the claim were not conclusive to preclude determination by the Court of Claims, under Wunderlich Act standards, the adjustment board's findings were final and conclusive with respect to the claims over which the board had jurisdiction pursuant to the contract at issue.[55] The Court concluded that the Wunderlich Act limited the finality accorded to the administrative fact-finding under the dispute clause of the contract.[56]

Discussing both collateral estoppel and res judicata, the Court included the following language in its decision: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[57] The Supreme Court used this language again in the *Elliott* case, discussed in more detail below.[58] The Court in *Utah Construction & Mining Co.* noted that "courts have used language to the effect that res judicata principles do not apply to administrative proceedings, [but the Court reasoned that] such language is certainly too broad."[59]

In *Allen v. McCurry*,[60] the Supreme Court analyzed a case in which the plaintiff was convicted in Missouri of drug and assault charges.[61] The plaintiff brought a civil rights suit against the arresting officers and others alleging an unconstitutional search and seizure.[62] The district court rendered a decision for the defendants, and the Eighth

53. 384 U.S. 394 (1966), *recognized as abrogated by statute*, Essex Electro Eng'rs, Inc. v. United States, 702 F.2d 998 (Fed. Cir. 1983).
54. *Id.*
55. *Id.* at 394.
56. *Id.* at 418-22.
57. *Id.* at 422.
58. *See infra* text accompanying notes 139-60.
59. *Utah Constr. & Mining Co.*, 384 U.S. at 421-22.
60. 449 U.S. 90 (1980).
61. *Id.*
62. *Id.* at 92-93.

Circuit reversed and remanded.[63] The Supreme Court reversed and remanded the decision of the Eighth Circuit, holding that the doctrine of collateral estoppel applies to actions pursuant to the Civil Rights Act of 1871 and encompasses civil or criminal state court judgments or decisions.[64] The Court held that "under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[65] The Court found that "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."[66] The Court noted that the benefits of both doctrines include relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication.[67]

The *Allen* Court also noted that "the concept of collateral estoppel [does] not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."[68] This concept became the focal point of Travers' battle against factual preclusion.[69] Moreover, the Court in *Allen* noted that federal courts generally accord preclusive effect to issues decided by state courts.[70] It also stated that Congress, via 28 U.S.C. § 1738, "has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgment emerged would do so."[71] This concept influenced the logic the court employed in *Travers*.[72]

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63. *Id.*
64. *Id.* at 90.
65. *Id.* at 94 (citing Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)). This doctrine has become known as claim preclusion.
66. *Allen*, 449 U.S. at 94 (citing Montana v. United States, 440 U.S. 147, 153 (1979)). This doctrine has become known as issue preclusion.
67. *Id.*
68. *Id.* at 95.
69. *See* Travers v. Jones, 323 F.3d 1294, 1296 (11th Cir. 2003).
70. *Allen*, 449 U.S. at 96.
71. *Id.*
72. *Travers*, 323 F.3d at 1296.

Another early case in which the U.S. Supreme Court applied the doctrines of res judicata and collateral estoppel is *Kremer v. Chemical Construction Corp.*[73] In *Kremer*, the Supreme Court decided a Title VII employment discrimination suit that the district court dismissed and the Second Circuit affirmed.[74] The Supreme Court held that a prior administrative dismissal of the case on the grounds that the decision in question was not the product of discrimination effectively precluded the subsequent federal suit.[75] Citing 28 U.S.C. § 1738, the Court discussed res judicata and collateral estoppel principles.[76] It determined, similar to its holding in *Allen*, that under the doctrine of collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes re-litigation of the same issue on a different cause of action between the same parties.[77] Moreover, the Court also reasoned that Title VII of the Civil Rights Act of 1964 did not intend to repeal by implication 28 U.S.C. § 1738, thus implying that defendants can utilize collateral estoppel to bar re-litigation of facts in discrimination cases.[78] The Court also noted that res judicata and collateral estoppel bar re-litigation of facts when the party against whom a court renders a decision had a "full and fair opportunity to litigate the claim or issue."[79] Significantly, the *Kremer* court decided that:

> Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum

73. 456 U.S. 461 (1982).

74. *Id.* at 466.

75. *Id.* at 465-66. The Appellate Division of the New York Supreme Court upheld and subsequently affirmed the decision on administrative appeal. *Id.*

76. *Id.* at 466-68.

77. *Id.* at 466-67.

78. *Kremer*, 456 U.S. at 469-72 n.10. In fact, after noting its prior decision in *Allen*, the Court found that there is more in 42 U.S.C. § 1983 to suggest an implied repeal of 28 U.S.C. § 1738 than the Court was able to find in Title VII. *Id.*

79. *Id.* at 480-81 (citing Allen v. McCurry, 449 U.S. 90 (1980)).

> procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.[80]

The Court then went on to discuss some of the potential due process requirements for a discrimination case and concluded that the administrative court afforded the plaintiff due process.[81] Although it did not hold them to be requirements, the court did note that the hearing provided the plaintiff in that case an opportunity to present his charges of discrimination, the right to submit exhibits, the right to testify, the right to call witnesses, the right to rebut the employer's evidence, the right to an attorney, the right to subpoena witnesses, a hearing, and judicial review of the decision.[82] Finally, it noted that the failure of the plaintiff "to avail himself of the full procedures [afforded did] not constitute a sign of their inadequacy."[83] Notably, for purposes of the doctrine of fact preclusion, the holding in *Kremer* dealt with an earlier administrative decision a state court reviewed, rather than a non-reviewed decision.[84]

In 1984, the Supreme Court again affirmed *Allen* in the case of *Migra v. Warren City School District Board of Education.*[85] In *Migra*, the Supreme Court held that an Ohio judgment obtained for a state breach of contract and wrongful interference with an employment contract had the same preclusive effect under 42 U.S.C. § 1983 as if the plaintiff brought the claims in Ohio state courts.[86] Thus, the Court remanded the case for a determination as to the preclusive effect in Ohio state courts.[87]

In *Marrese v. American Academy of Orthopedic Surgeons*,[88] the Supreme Court again analyzed the power of the federal full faith and

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80. *Id.* at 481.
81. *Id.* at 482-85.
82. *Id.* Travers had the right to use all of these procedural items except for the right to subpoena witnesses in his administrative hearing. Travers v. Jones, 323 F.3d 1294, 1297 (11th Cir. 2003).
83. *Kremer*, 456 U.S. at 485.
84. *Id.* at 464.
85. 465 U.S. 75 (1984).
86. *Id.* at 84-85.
87. *Id.* at 87.
88. 470 U.S. 373 (1985), *reh'g denied*, 471 U.S. 1062 (1985).

credit statute to dispose of previously litigated issues.[89] The Court held that the full faith and credit statute "does not allow federal courts to employ their own rules of res judicata in determining the effect of [prior] state judgments."[90] Instead, the statute "commands federal courts to accept the rules chosen by the state from which the judgment was taken."[91]

The Eleventh Circuit Court of Appeals rendered one of the early decisions in *Gorin v. Osborne*.[92] In *Gorin*, the Eleventh Circuit held that the *Kremer* decision controlled the disposition of the case.[93] The *Gorin* court affirmed the employer's motion for summary judgment in a Section 1983 case brought by a former employee who alleged that her termination violated her rights to due process and equal protection.[94] Citing *Woods v. Delta Air Lines, Inc.*,[95] *Seaboard Fire & Marine Ins. Co. v. Smith*,[96] and *Hicks v. Standard Accident Ins. Co.*,[97] the *Gorin* court held that "Georgia courts would accord preclusive effect to the decision of an administrative tribunal *as affirmed by the Superior Court*."[98] Therefore, the court in *Gorin* affirmed summary judgment because a superior court affirmed the decision by the administrative tribunal and because the plaintiff had a full and fair opportunity to litigate her claims before that tribunal, thus providing the requisite due process.[99] The court further held that the *Kremer* decision does not specify "a minimum level of judicial review as a prerequisite" for applying preclusion to the judicial affirmation of a state administrative decision.[100] Thus, the Georgia Supreme Court held that the "any evidence" standard utilized by the

89. *Id.*
90. *Id.* at 380 (quoting *Kremer*, 456 U.S. at 481-82).
91. *Id.*
92. 756 F.2d 834 (11th Cir. 1985).
93. *Id.* at 836.
94. *Id.* at 835.
95. 227 S.E.2d 376 (Ga. 1976).
96. 247 S.E.2d 607 (Ga. Ct. App. 1978).
97. 184 S.E. 808 (Ga. Ct. App. 1936).
98. *Gorin*, 756 F.2d at 837 (emphasis added).
99. *Id.*
100. *Id.* at 837-38.

superior court in *Gorin* was sufficient.[101] But what if the decision below was of no use because the subsequent litigation involved different claims? What if no court reviewed the administrative tribunal's decision?

The Supreme Court in *University of Tennessee v. Elliott*[102] partially answered these questions.[103] The *Elliott* case serves as a starting point for many in the analysis of fact preclusion. However, as demonstrated above, it has its genesis in several other Supreme Court decisions dealing with the doctrines of collateral estoppel and res judicata.

In *Elliott*, a minority employee of the University of Tennessee filed an administrative appeal after receiving notice of his pending termination.[104] While the administrative appeal was pending, he filed suit in federal district court alleging employment discrimination.[105] The United States District Court for the Western District of Tennessee entered judgment for the University, but the Sixth Circuit Court of Appeals reversed the decision.[106] On certiorari, the Supreme Court held that non-reviewed state administrative decisions did not have a preclusive effect on the employee's Title VII claims but did have a preclusive effect on an employee's claims under the Reconstruction Civil Rights Statutes, particularly 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988.[107] However, the Court also held:

> Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts must give the agency's factfinding the

101. *Id.* at 836. This holding is significant because this standard is the same standard utilized by Georgia Superior Courts in certiorari appeals filed by civil service employees. *See* O.C.G.A. § 5-4-12(b) (Supp. 2004); *see also* Emory Univ. v. Levitas, 401 S.E.2d 691, 694 (Ga. 1991).

102. 478 U.S. 788 (1986).

103. *Id.*

104. *Id.* at 790.

105. *Id.* at 790-91.

106. *Id.* at 792.

107. *Id.* at 796-97.

> same preclusive effect to which it would be entitled in the State's courts.[108]

The Court in *Elliott* held that 28 U.S.C. § 1738 was "not applicable to the unreviewed state administrative factfinding at issue in [the] case."[109] However, it noted that the Court had often created federal common law rules of preclusion when no governing statute existed and then analyzed whether it should fashion a rule.[110] The Court first determined that, under *Kremer* and *Chandler v. Roudebush*,[111] it appeared that a claimant has the right to a trial de novo in Title VII actions and that res judicata does not apply to administrative decisions so as to bar later claims in Title VII actions.[112] Ultimately, the Court decided that a common law rule of claim preclusion would be inconsistent with Congress's intent in enacting Title VII, and it declined to create such a rule.[113] However, the Court's findings were markedly different under the other civil rights statutes at issue in the case.[114] While the Court noted that neither the *Allen* nor the *Migra* decision was controlling, it still cited them as support for the proposition that Congress did not intend to create an exception to general rules of preclusion in enacting the Reconstruction Civil Rights statutes.[115] The Court found that the doctrine of preclusion advances several important interests, including avoiding the "cost[s] and vexation of repetitive litigation," conservation of judicial resources, and federalism.[116] Ultimately, the Court determined that when state agencies are acting in a judicial capacity, their decisions are given preclusive effect if (1) the parties had an "adequate opportunity to litigate," and (2) the state's courts would give the same

108. *Elliott*, 478 U.S. at 799 (citing United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966)) (citation omitted).
109. *Id.* at 794.
110. *Id.*
111. 425 U.S. 840 (1976).
112. *Elliott*, 478 U.S. at 795.
113. *Id.* at 795-96.
114. *Id.* at 796-97.
115. *Id.*
116. *Id.* at 797-99.

preclusive effect to the administrative agency's fact-finding.[117] This holding, however, applies only to subsequent litigation under federal civil rights statutes, including 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988. Thus, after *Elliott* the preclusive effect of non-reviewed state agency fact-finding applies only to suits under the above-referenced federal civil rights statutes and does not apply to Title VII actions.[118]

Eleventh Circuit courts have rendered several noteworthy decisions in this area since the Supreme Court's decision in *Elliott*. In *Sharpley v. Davis*,[119] the Eleventh Circuit concluded that an elementary school principal could not raise constitutional claims in federal court.[120] The court in *Sharpley* held that Georgia's administrative procedures afforded school system employees all the process that is constitutionally required under the circumstances.[121] The court found that the employee could not bring subsequent litigation pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 because the State Board of Education, the superior court, and the Georgia Supreme Court affirmed his termination.[122] The court held that collateral estoppel and res judicata principles required that the Georgia "court affirmation of the administrative process [be] conclusive for purposes of Georgia law as to all issues raised or which might have been raised in the state proceedings."[123] The court did not mention the decision in *Elliott* but cited to *Kremer*, *Migra*, and *Allen*.[124]

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117. *Id.* at 799.

118. The exclusion of Title VII actions does not appear to extend to other federal employment civil rights statutes. *See, e.g.*, Stillians v. Iowa, 843 F.2d 276, 281-82 (8th Cir. 1988); Roberts v. Fairfax, 937 F. Supp. 541, 547 (E.D. Va. 1996).

119. 786 F.2d 1109 (11th Cir. 1986).

120. *Id.* at 1112. The principal's contract was not renewed due to his supervision of corporal punishment on an unruly student. *Id.* at 1110.

121. *Id.*

122. *Id.* at 1112.

123. *Id.* at 1111; O.C.G.A. § 9-12-40 (2004).

124. *Sharpley*, 786 F.2d at 1111. The lack of analysis of the *Elliott* decision appears to have been a key to the following language in the *Sharpley* decision: "While the resort to administrative proceedings alone does not preclude subsequent federal action, subsequent state court review will bar a later federal action." *Id.* at 1112. As discussed above, the *Elliott* decision granted preclusive effect to factual findings in non-reviewed administrative decisions if state law does so and if Congress has not prevented preclusion from being applied to the claims at issue. *See supra* notes 99-114 and accompanying text.

The Eleventh Circuit reached another significant decision in *Gjellum v. City of Birmingham.*[125] In *Gjellum*, a terminated police officer brought a federal civil rights action pursuant to 42 U.S.C. § 1983 against Birmingham and its police chief.[126] The police chief had suspended the appellant without pay because he attempted to secretly tape official police business without authority.[127] Gjellum appealed his suspension to the local personnel board.[128] Following a hearing, the board reversed the suspension and ordered reinstatement with back pay because there was no policy prohibiting Gjellum's actions at the time of the incident.[129] The City appealed the decision to state court.[130] Gjellum attempted to intervene in the appeal, but the court denied his motion.[131] Applying a limited review standard, the state court affirmed the board's decision.[132] Gjellum then brought claims in federal district court pursuant to 42 U.S.C. § 1983, but the district court dismissed the case, relying on *Elliott.*[133] It found that Gjellum "was barred by the doctrines of claim preclusion and collateral estoppel from relitigating matters previously decided by the board."[134]

The Eleventh Circuit reversed the district court's decision and remanded the case for further proceedings.[135] The court split its res judicata analysis into two issues: claim preclusion and issue preclusion.[136] It found that only claim preclusion was applicable in the *Gjellum* case.[137] According to the court, the distinction revolves around whether the matter was litigated and decided (issue

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Moreover, as discussed below, Georgia law developed later to allow the Eleventh Circuit to reach a different conclusion in *Travers*. *See infra* Part I.C.2.

125. 829 F.2d 1056 (11th Cir. 1987).
126. *Id.* at 1057.
127. *Id.* at 1058.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Gjellum*, 829 F.2d at 1058.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 1072.
136. *Id.* at 1058-59.
137. *Gjellum*, 829 F.2d at 1058-59.

preclusion) before the administrative tribunal or whether the matter had not been litigated and decided but should have been put forth before the lower tribunal (claim preclusion).[138]

The court then analyzed the effect of the prior decisions of the board and its affirmation by the state court in the context of claim preclusion because, unlike the *Travers* case, the parties had not raised or litigated the issues below.[139] It first addressed whether Alabama law would have required preclusion of subsequent re-litigation of the issues in question.[140] Determining that because the parties were not substantially identical to the parties in federal action, the court held that Alabama law would not apply claim preclusion to the case.[141] The court then discussed whether having litigated his grievance before the City's personnel board barred Gjellum's Section 1983 claim.[142]

According to the court in *Gjellum*, "[p]rior to the *Elliott* decision, [the Eleventh Circuit] held that a federal district court must engage in *de novo* review of a Section 1983 claim even if the plaintiff pursued his or her constitutional claim in a state administrative hearing that was not reviewed by state courts."[143] However, the court in *Gjellum* quoted the language referenced above from *Elliott*, noting that this effected a change in the Eleventh Circuit's view on preclusion.[144] It then proceeded to limit the applicability of the *Elliott* fact preclusion language only to issue preclusion in instances in which a state court did not review the decision of the administrative body.[145] The court stated its holding as follows:

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138. *Id.* at 1059 n.3. The court also pointed out that the concepts involved in preclusion have been "discussed and determined in varying and occasionally conflicting terminology." *Id.* (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981)).

139. *Compare* Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003), *with* Gjellum v. City of Birmingham, 829 F.2d 1056, 1059 (11th Cir. 1987).

140. *Gjellum*, 829 F.2d at 1058-59.

141. *Id.* at 1060-61 (holding that the parties were not substantially identical because the lower court did not allow Gjellum to intervene in the state court appeal).

142. *Id.* at 1061.

143. *Id.* at 1061-62. The court in *Gjellum* did acknowledge that in *Holley v. Seminole County Sch. Dist.*, 755 F.2d 1492, 1504-05 (11th Cir. 1985) and in *Gorin*, it held that the applicability of the administrative preclusion doctrine remained open. *Gjellum*, 829 F.2d at 1062 n.14.

144. *Gjellum*, 829 F.2d at 1062.

145. *See id.* at 1062-69.

> We hold therefore that unreviewed state agency decisions will not receive claim preclusive effect in a section 1983 action regardless of whether a court of the state from which the judgment arose would bar the section 1983 claim. Where the agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, a federal court in a section 1983 action may, of course, consider whether the state would give preclusive effect to the state agency factfindings and, if so, whether any additional federal preclusion requirements apply to prevent precluding re-litigation of this factfinding.[146]

Thus, the lesson from *Gjellum* is that in the Eleventh Circuit, factual preclusion applies differently in different circumstances.[147] If the parties did not litigate the claim or factual issue before the administrative tribunal but *could have* done so, then claim preclusion applies only if a state court reviews the administrative decision.[148] One can logically infer that, for claim preclusion to apply, the state court system must also apply it and litigants must have a fair and adequate opportunity to litigate the factual issue in question at the administrative hearing. If, however, the factual issue was actually litigated and determined before the administrative tribunal, state court review is not necessary to apply issue preclusion if the state courts would also bar re-litigation of the issue.[149] Finally, a court must determine whether the administrative tribunal afforded the litigants a fair and adequate opportunity to litigate.[150] Thus, the *Gjellum* decision limited preclusion arguments somewhat, while leaving some issues open to determination.[151]

In *Carlisle v. Phenix City Board of Education*,[152] the Eleventh Circuit declined to apply preclusion but did so for reasons uniquely

146. *Id.* at 1070.
147. *See generally id.*
148. *See, e.g., id.*
149. *Id.*
150. *Gjellum*, 829 F.2d at 1062.
151. *See generally id.*
152. 849 F.2d 1376 (11th Cir. 1988).

tied to the case's facts.[153] The Phenix City Board of Education (Alabama) transferred plaintiff Carlisle upon the recommendation of its superintendent.[154] Carlisle then requested and received a hearing before the Board.[155] The Board voted again and approved the transfer.[156] The Alabama State Tenure Commission reversed the decision on appeal.[157] When the Board petitioned a county circuit court for a writ of mandamus, the court vacated the Commission's decision and reinstated the Board's decision.[158] The Commission appealed, but the appeals court affirmed the decision below.[159] Carlisle then filed an EEOC charge alleging race discrimination under Title VII and 42 U.S.C. § 1983.[160]

The Eleventh Circuit did not mention the decision in *Gjellum* but did cite *Gorin*, *Migra*, and *Kremer*.[161] The court stated that "[t]he Supreme Court has been unambiguous in directing federal courts . . . to apply state principles when considering the preclusive effects of state decisions" on Section 1983 and Title VII litigation.[162] The court stated that judicial appeals of state administrative decisions precluded federal re-litigation of the same issues and then discussed Alabama preclusion law.[163] The *Carlisle* court held that collateral estoppel did not apply because the parties did not litigate the issue, racial discrimination, on appeal.[164] The court then held that the racial discrimination issue could have been litigated and decided in state court, thus barring the application of the doctrine of res judicata.[165] Thus, because of issues tied directly to Alabama law and the nature

153. *Id.*
154. *Id.* at 1377.
155. *Id.* at 1377-78.
156. *Id.*
157. *Id.* at 1378.
158. *Carlisle*, 849 F.2d at 1378.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 1378-81.
164. *Carlisle*, 849 F.2d at 1378-79.
165. *Id.* at 1382.

of the case, the Eleventh Circuit declined to apply factual preclusion to the facts in *Carlisle*.[166]

In *Nix v. Hardison*,[167] the U.S. District Court for the Northern District of Georgia applied the emerging preclusion rules to an administrative decision of the State Personnel Board.[168] In *Nix*, a member of the Georgia State Patrol brought a Section 1983 action claiming the agency deprived him of due process by demoting him for misconduct.[169] The district court ruled that the doctrine of issue preclusion prevented the plaintiff from re-litigating issues that the State Personnel Board had already determined.[170] The court noted the difference between issue preclusion and claim preclusion and that, in this case, the analysis concerned solely issue preclusion.[171]

Citing *Marrese*, the *Nix* Court determined that "[t]hree conditions must be met before an agency's decision [is given] preclusive effect: (1) the agency must be performing a judicial function, (2) the parties must have had an adequate opportunity to litigate the [issue or] issues, and (3) the issues must be properly before the [administrative] agency."[172] The court then analyzed Georgia law, holding that "Georgia law affords the decisions of a hearing officer with the State Personnel Board full preclusive effect."[173] The court further held that in Georgia a court must find three prerequisites for the doctrine of issue preclusion to apply:

> (1) that the issue at stake be identical to the one involved in the prior litigation, (2) that the issue has been litigated in the prior litigation; and (3) that the determination of the issue in the prior

166. *See generally id.* at 1376.
167. 712 F. Supp. 185 (N.D. Ga. 1989).
168. *Id.*
169. *Id.* at 186.
170. *Id.* at 189.
171. *Id.* at 188 n.1.
172. *Id.* at 188.
173. *Nix*, 712 F. Supp. at 188 (citing Woods v. Delta Air Lines, Inc., 227 S.E.2d 376 (Ga. 1976)).

> litigation has been a critical and necessary part of the judgment in the earlier action.[174]

In determining that factual issue preclusion applied, the court decided that all of these elements existed in the *Nix* case.[175]

Another Eleventh Circuit decision that bears mentioning is *Hunter v. City of Warner Robbins*.[176] In *Hunter*, the plaintiff was a Warner Robbins firefighter-EMT who did not receive a promotion allegedly due to tardiness.[177] The plaintiff filed a formal grievance with the fire chief, claiming that the chief did not have the authority to deny him the promotion due to tardiness.[178] The fire chief denied his grievance.[179] The plaintiff then appealed to the city's personnel director, who upheld the denial of the promotion but issued a factual finding suggesting that the chief should have published the fire department's policies better.[180] The plaintiff then appealed the decision to an administrative law judge ("ALJ"), who held a hearing that included testimony, evidence, and the cross-examination of witnesses.[181] The ALJ upheld the decision not to promote the plaintiff but also issued factual findings relating to the fire department's policies.[182] The plaintiff then appealed the decision to the mayor and city council, who upheld the ALJ's decision.[183] Hunter then filed suit under 42 U.S.C. § 1983, alleging a violation of his due process rights as protected under Fourteenth Amendment.[184] The defendants filed a motion for summary judgment, contending that the "ALJ's findings of fact . . . were entitled to preclusive effect."[185]

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174. *Id.* (citing Georgia State Conference v. State of Georgia, 570 F. Supp. 314 (S.D. Ga. 1983)).
175. *Id.* at 189.
176. 842 F. Supp. 1460 (M.D. Ga. 1994).
177. *Id.* at 1462-63.
178. *Id.*
179. *Id.*
180. *Id.* at 1463.
181. *Id.* at 1464.
182. *Hunter*, 842 F. Supp. at 1464.
183. *Id.*
184. *Id.*
185. *Id.*

The Court in *Hunter* cited to *Elliott* and *Gjellum* in holding that a state agency's factfinding, when acting in a judicial capacity to resolve "issues of fact properly before it which the parties have had an adequate opportunity to litigate," have the same preclusive effect in the forum state's courts.[186] The court also held that the same three conditions utilized in *Nix* must exist for the factfinding to be given preclusive effect and that Georgia courts should "give issue preclusive effect to agency factfinding under the traditional guidelines for collateral estoppel."[187] Finally, the court determined that the three additional prerequisites to preclusion discussed in *Nix* applied in Georgia.[188] The court held that under the above-referenced authorities the ALJ properly determined the factual issue in question, whether the City improperly denied the plaintiff promotion under its policies.[189] Thus, the court gave this finding a preclusive effect in the Section 1983 case.[190]

In *Thornquest v. King*,[191] the Eleventh Circuit partially declined to apply fact preclusion and thus overturned a district court's decision to apply fact preclusion in granting summary judgment against one of the plaintiffs.[192] In *Thornquest*, a college transferred and then discharged the plaintiff from his position as a college professor.[193] While the college itself informed the plaintiff of his transfer, the college president recommended termination to the Board of Trustees, who then terminated the plaintiff's employment.[194] "Believing the Board to be biased," the plaintiff unsuccessfully sought a review of his termination and a court injunction to prevent the Board from hearing his discharge case.[195] The plaintiff also tried to disqualify the

186. *Id.* at 1465.

187. *Id.* (citing Blackwell v. Ga. Real Estate Comm'n, 421 S.E.2d 716 (Ga. Ct. App. 1992); Hunter v. State, 382 S.E.2d 679 (Ga. Ct. App. 1989) (holding that Georgia applied preclusion to agency factfinding)).

188. *Hunter*, 842 F. Supp. at 1465.

189. *See id.* at 1469.

190. *See id.* at 1466.

191. 82 F.3d 1001 (11th Cir. 1996).

192. *Id.* at 1005.

193. *Id.* at 1002-03.

194. *Id.* at 1003.

195. *Id.*

Board members, but only two disqualified themselves.[196] The Board found that the college president and the Board were not "motivated by unconstitutional retaliation [when they] discharged him."[197] The plaintiff then filed suit under Section 1983 and the First Amendment.[198]

After citing *Elliott* and *Gjellum*, the court held that preclusion did not apply to the Board's decision to terminate the professor because the Board was acting as an employer rather than in a judicial capacity as required by *Elliott*.[199] The court specifically cited to Florida law to show that the Board employed the professor.[200] Moreover, the court held that, because the Board was the professor's employer, his First Amendment retaliation case "could not have been properly before the Board, nor could the parties have had an adequate opportunity to litigate [the] issue before the Board."[201] Significantly, the court held that factual preclusion could apply to the Board's decision on the plaintiff's transfer.[202] The plaintiff's transfer differed because the college initiated it while the Board merely acted as a reviewing "judicial" body, rather than as an employer.[203] Thus, the court afforded preclusive effect solely to any findings of fact made by the Board as to the plaintiff's transfer.[204]

A final Eleventh Circuit decision in this area that bears mentioning is *Maniccia v. Brown*.[205] In *Maniccia*, the Eleventh Circuit Court of Appeals affirmed a Florida district court's decision to grant summary judgment to a county sheriff-employer based in part on the doctrine of collateral estoppel.[206] The plaintiff, a terminated deputy sheriff, alleged "disparate treatment and retaliation in violation of Title VII of

196. *Id.*
197. *Thornquest*, 82 F.3d at 1003.
198. *Id.* at 1002.
199. *Id.* at 1004.
200. *Id.* (citing Burney v. Polk Cmty. Coll., 728 F.2d 1374, 1376 (11th Cir. 1984)).
201. *Id.*
202. *Id.*
203. *Thornquest*, 82 F.3d at 1004.
204. *Id.*
205. 171 F.3d 1364 (11th Cir. 1999).
206. *Id.* at 1366.

the Civil Rights Act of 1964 . . . and the Florida Civil Rights Act."[207] When the plaintiff "challenged her termination at a hearing before the [county's civil service board]," the board found that the sheriff had just cause to terminate her employment because the plaintiff had lied and committed various policy violations.[208] The employee appealed the decision to a county circuit court, but the court denied her appeal.[209] She then filed suit in state court alleging discrimination and retaliation.[210] The sheriff removed the case to federal court, where the district court granted him partial summary judgment on the grounds that the civil service board's decision estopped the employee from alleging that she did not commit policy violations or lie.[211]

The Eleventh Circuit affirmed the decision of the district court.[212] Citing *Kremer*, *Sharpley*, and *Migra*, the court determined that "[a] state court's decision upholding an administrative body's findings has preclusive effect" if the administrative finding would bind that state's court and if the state proceedings "comported with the requirements of due process."[213] The court further found that "Florida courts recognize the preclusive effect of state court decisions upholding administrative determinations" below.[214] The court determined that the lower court satisfied the due process requirements because the plaintiff had counsel, testified, called witnesses, and cross-examined adverse witnesses.[215] Thus, the Eleventh Circuit agreed that the employee was "estopped from arguing [that] she did not lie" or violate policies.[216] Citing *Carlisle*, the court determined that the employee may allege and try to prove that "her termination was also the product of sex discrimination or retaliation."[217]

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207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 1366-67.
211. *Maniccia*, 171 F.3d at 1366-67.
212. *Id.* at 1366.
213. *Id.* at 1368.
214. *See, e.g.*, Sch. Bd. of Seminole County v. Unemployment Appeals Comm'n, 522 So. 2d 556, 556-57 (Fla. Dist. Ct. App. 1988).
215. *Maniccia*, 171 F.3d at 1368.
216. *Id.*
217. *Id.*

The decision in *Maniccia* underscores the limited role of collateral estoppel and fact preclusion in the area of Title VII litigation in the Eleventh Circuit.[218] Collateral estoppel principles do not apply to Title VII claims unless the decision of an administrative body is appealed to a state court.[219] Even then, a plaintiff may attempt to bring his claims despite preclusion on some issues, thereby taking advantage of his right to a de novo hearing on the Title VII claims.

As the above discussion illustrates, the doctrine of preclusion was in a period of flux in federal courts between 1965 and 1996 and became more clearly defined by courts as time went on.[220] However, Georgia law was also in flux during this time frame.[221] Because state law plays an important part in the preclusion process, a discussion of state law follows.

b. Georgia Law

From 1976 to 2002, Georgia law also evolved in a manner that made it easier for the Eleventh Circuit Court of Appeals to apply issue preclusion to the facts in *Travers*.[222] In 1976, the Georgia Supreme Court decided the case of *Woods v. Delta Air Lines, Inc.*[223] This early decision validated some use of the doctrine of preclusion in Georgia law.[224] In *Woods*, an injured employee brought an action against his employer to recover under the employer's "Family Care

218. *Id.* at 1364.

219. *See id.*

220. There is another unreported decision by a federal district court that deals with factual preclusion. *See* Johnson v. Gwinnett County, No. 1:91-CV-685-ODE (N.D. Ga. Nov. 25, 1992) (order granting partial summary judgment to the defendants in a Section 1983 First Amendment case on the basis of the factually preclusive effect of a prior merit system board ruling). *Id.* The court issued an initial order on Feb. 21, 1992 that denied summary judgment on the basis of factual preclusion, citing *Flournoy* and *Gjellum*. *Id.* However, after a second motion for summary judgment by the defendants, the judge granted summary judgment. *Id.* The ruling in *Johnson* differed from the *Travers* ruling because the judge allowed the plaintiff in *Johnson* to demonstrate pretext by showing that the findings of the administrative body were a pretext for unlawful retaliation in violation of the First Amendment. The plaintiff in *Johnson* failed to put forth such evidence during the summary judgment process, and thus the court granted summary judgment.

221. *See infra* Part I.C.1.b.

222. *See* Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003).

223. 227 S.E.2d 376 (Ga. 1976).

224. *Id.* at 377.

Disability and Service Plan."[225] Previously, the State Board of Workers' Compensation found the plaintiff to be totally disabled.[226] The trial court granted partial summary judgment to the employee because the award of the Board of Worker's Compensation operated as res judicata or estoppel by judgment as to the issue of whether the employee was totally disabled.[227] The court of appeals reversed, holding that res judicata did not apply and that "estoppel by judgment . . . is ineffective against the Georgia constitutional right to trial by jury."[228] The Georgia Supreme Court affirmed the court of appeals' ruling but issued some helpful findings.[229] Citing *Jones v. American Mutual Liability Insurance Co.*[230] and *Noles v. National Engine Rebuilding Co.*,[231] the court held that the "doctrines of res judicata and estoppel by judgment" apply to the findings of fact by the State Board of Workers' Compensation "in matters in which it has jurisdiction."[232] It further held that although the right to a jury trial does not apply to workers' compensation proceedings, it does not render the two doctrines ineffective.[233] Citing *Brown v. Brown*,[234] the Court determined that

> res judicata applies only as between the same parties and upon the same cause of action to matters which were actually in issue or which under the rules of law could have been put in issue, [whereas] estoppel by judgment applies as between the same parties upon any cause of action to matters which were directly decided in the former suit.[235]

225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* (internal quotations omitted).
229. *Woods*, 227 S.E.2d at 377.
230. 172 S.E. 600 (Ga. Ct. App. 1933).
231. 169 S.E.2d 185 (Ga. Ct. App. 1969).
232. *Woods*, 227 S.E.2d at 377.
233. *Id.* at 377-78.
234. 91 S.E.2d 495, 497 (Ga. 1956).
235. *Woods*, 227 S.E.2d at 377 (equating res judicata with issue preclusion and estoppel by judgment with claim preclusion).

The court declined to apply res judicata because the worker's compensation action was different than the cause of action under the "plan" at issue in the case.[236] It also held that the doctrine of estoppel by judgment did not apply because the Board did not determine whether the employee was totally disabled under the "plan" *at issue*.[237]

In 1989, the Georgia Court of Appeals decided *Hunter v. State*.[238] In *Hunter*, the defendant appealed his convictions for driving under the influence and failure to drive in the proper traffic lane.[239] The appellate court held that the letter signed by an administrative hearing officer informing the defendant that the agency would not suspend his driver's license under the implied consent law was not probative of his refusal to take the intoximeter test.[240] Thus, the court properly excluded the letter from evidence.[241] In so holding, the court first discussed some broad principles of collateral estoppel and res judicata.[242] Citing *Epps Air Service v. Lampkin*,[243] the court decided that an administrative decision may act as an estoppel in a judicial proceeding in Georgia.[244] However, estoppel in this situation is appropriate only between the same parties and only where the issue decided by the administrative proceeding is the same as that in the litigation.[245] Citing *Boozer v. Higdon*,[246] the court then found that the letter did not fulfill the requirements of the doctrine of estoppel and excluded it from evidence.[247]

In 1989, the Supreme Court decided the noteworthy case of *McCracken v. City of College Park*.[248] In *McCracken*, a beer and wine licensee brought an action against College Park for injunction

236. *Id.* at 377-78.
237. *Id.* at 378.
238. 382 S.E.2d 679 (Ga. Ct. App. 1989).
239. *Id.*
240. *Id.* at 681.
241. *Id.*
242. *Id.* at 679-80.
243. 194 S.E.2d 437 (Ga. 1972).
244. *Hunter*, 382 S.E.2d at 680.
245. *Id.* at 681.
246. 313 S.E.2d 100 (Ga. 1984).
247. *Hunter*, 382 S.E.2d at 681.
248. 384 S.E.2d 648 (Ga. 1989).

and damages relating to enforcement of an ordinance prohibiting the sale of beer to minors.[249] The action challenged the constitutionality of the ordinance.[250] The superior court granted summary judgment to the City, and the licensee appealed.[251] The Georgia Supreme Court held that the doctrine of res judicata barred the licensee's action because the licensee had filed an appeal of the revocation of her license.[252] Both the mayor and city council voted to suspend the license, and the superior court affirmed the decision.[253] The court also held that this prior adjudication precluded further litigation under res judicata, finding the prerequisites to be "(1) identity of the parties; (2) identity of the cause of action; and (3) prior adjudication by a court of competent jurisdiction."[254] The court held that the only difference between the two actions was that the first was a petition for certiorari and the second was an action at equity.[255] Thus, the actions were identical because they attempted to remedy the same alleged wrong, differing only in the nature of the relief sought.[256]

The court of appeals decided another workers' compensation case in *Garrett v. K-Mart Corporation*.[257] In *Garrett*, an employee "brought an action against her employer . . . seeking damages for injuries she incurred when she fell while at work."[258] The trial court dismissed the case, and the employee appealed.[259] According to the court of appeals,

> [The employee initially] sought benefits under the [Georgia] Workers' Compensation Act . . . but her claim was denied based on the findings of the administrative law judge and the State Board of Workers' Compensation that [her] injury did not arise

249. *Id.* at 649 n.1.
250. *Id.* at 650.
251. *Id.* at 649.
252. *Id.* at 650.
253. *Id.* at 649.
254. *McCracken*, 384 S.E.2d at 649 (citing State Bar of Ga. v. Beazley, 350 S.E.2d 422 (Ga. 1986)).
255. *Id.*
256. *Id.*
257. 398 S.E.2d 302 (Ga. Ct. App. 1990).
258. *Id.* at 303.
259. *Id.*

> out of her employment . . . but rather was caused by a pre-existing condition that was not aggravated by her work.[260]

The trial court held that O.C.G.A. § 34-9-11 barred her common law tort case because her injuries occurred "in the course and scope of her employment."[261] The court determined that, although the plaintiff had not previously litigated the exact question posed, the plaintiff could have and should have litigated the issue in the workers' compensation case.[262]

The court in *Garrett* ultimately held that, in Georgia, even if the plaintiff did not in fact litigate a matter in the former suit but could and should have litigated it, the doctrine of res judicata controls.[263] The court further held that, "because [a] judgment is conclusive as to all matters put in issue, or which under the rules of law might have been put in issue on the trial of the case," the employee's failure to assert her new issue in prior litigation precluded her from raising the claim in the subsequent litigation.[264] In so doing, the court in *Garrett* affirmed the availability of claim preclusion as a defense in Georgia.[265]

One of the most frequently cited Georgia cases is *Flournoy v. Akridge*.[266] Until *Flournoy*, Georgia law appears to have been drifting towards applying issue preclusion (res judicata) and claim preclusion (collateral estoppel) to bar the re-litigation of issues and claims that parties had previously litigated or could have previously litigated.[267] However, the *Flournoy* decision cast doubt on whether issue preclusion or claim preclusion were effective defenses in Georgia, particularly in the area of government employment, but the court

260. *Id.* at 303-04.

261. *Id.* at 304; *see* O.C.G.A. § 34-9-11 (2004) (providing that workers' compensation is the sole remedy available to covered employees for injuries on the job).

262. *Garrett*, 398 S.E.2d at 305.

263. *Id.* at 304 (citing Georgia Cas. & Sur. Co. v. Randall, 292 S.E.2d 118, 120-21 (Ga. Ct. App. 1982)).

264. *Id.* (internal quotations omitted).

265. *Id.*

266. 400 S.E.2d 649 (Ga. 1990).

267. *See, e.g., id.* at 649.

gave little guidance as to when parties could utilize the doctrines.[268] In *Flournoy*, a former state employee brought an employment discrimination suit against state officials.[269] The trial court granted summary judgment to the state officials, and the employee appealed.[270] The Georgia Court of Appeals reversed the trial court's decision, ruling that the non-reviewed findings by a hearing officer in the employee's prior administrative proceedings were not binding in his subsequent civil rights suit.[271]

In *Flournoy*, the State of Georgia terminated the plaintiff from his employment, and the plaintiff subsequently filed a complaint with the State Personnel Board.[272] At the hearing, witnesses testified for both sides and the hearing officer "made extensive findings of fact and conclusions of law, and determined that there was sufficient cause for the dismissal . . . under the rules of the Personnel Board. The State Personnel Board upheld the decision of the hearing officer and adopted the officer's findings and conclusions."[273] There was no appeal of the administrative decision to the courts.[274] However, the employee then filed suit pursuant to 42 U.S.C. § 1983 and Title VII.[275] Ultimately, the employee only pursued his claims against the individual defendants, "alleging that he was terminated because of his race, his apolitical status and the exercise of his First Amendment rights to freedom of speech."[276]

The court of appeals determined that, because the claim before the administrative hearing officer and the federal action were "entirely separate cause[s] of action" and because "[t]he fact-finding process in the administrative procedure was geared toward[s] [proving different elements]," fact preclusion did not apply to the Section 1983

268. *See id.*
269. *Id.* at 650.
270. *Id.* at 651.
271. *Id.* at 651-52.
272. *Flournoy*, 400 S.E.2d at 650.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 650-51.

lawsuit.[277] The court acknowledged the availability of preclusion as a useful doctrine in Georgia by stating the following:

> The hearing officer was entertaining a state administrative claim and the case before us is based upon an entirely separate cause of action grounded in the federal statute. The factfinding process in the administrative procedure was geared toward proof of the elements of the administrative cause of action and was not necessarily the same factfinding process necessary to a full and proper litigation of appellant's Section 1983 claims. Therefore, we determine that we are not bound to accept the hearing officer's findings of fact as undisputed, and in light of the opposing affidavit submitted by appellant, we conclude that appellees have not met their burden on the motion for summary judgment.
>
> We are aware that in a different context, involving a different combination of forums, a federal court will give preclusive effect to state administrative findings in a Section 1983 action brought in federal court, when those findings have been affirmed by the state courts under the "any evidence" standard. In the instant case, our state courts have not had the opportunity to review the hearing officer's findings on direct appeal, and in the absence of such review, we do not find this federal precedent persuasive. Further, we do not feel that our conclusion is in conflict with the United States Supreme Court decision of *University of Tennessee v. Elliott*, in which the court held that federal courts must give an administrative agency's factfinding the same preclusive effect that it would be given in the state's courts when the agency is "acting in a judicial capacity [and] resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . ." First, the instant case does not involve the relationship between federal and state courts. Secondly, as we have previously stated, the factfinding process in a Section 1983 action is unique to the cause of action such that

277. *Id.* at 651.

> the appellant did not have the opportunity to litigate necessary facts and issues to that claim in an administrative hearing geared toward an entirely separate cause of action.[278]

A careful review of the prior and subsequent case law suggests that the decision in *Flournoy* was something of an anomaly.[279] However, it appears that for many years reliance on *Flournoy* dampened the use of the doctrine of fact preclusion in both state and federal courts, particularly in the area of public employment litigation. Although the case law solidly established the doctrine, public sector employment attorneys shied away from preclusion arguments, believing that *Flournoy* made fact preclusion unavailable in the context of unreviewed administrative hearings. However, after *Flournoy*, Georgia law again began to tilt toward the application of preemption in public sector employment cases.[280]

Blackwell v. Georgia Real Estate Commission[281] was the first case in which Georgia appellate courts re-affirmed the fact preclusion doctrine.[282] In *Blackwell*, a former licensed real estate broker sued the Georgia Real Estate Commission alleging that his license was erroneously revoked for racially discriminatory behavior.[283] The broker sought both a stay of the Commission's final decision to revoke the license and damages.[284] The trial court granted the Commission's motion to dismiss, and the broker appealed.[285]

Rather than cite to *Flournoy*, the *Blackwell* court cited to *Stiltjes v. Ridco Exterminating Co.*,[286] a contemporary decision, and to *Garrett*

278. *Flournoy*, 400 S.E.2d at 651-52 (citations omitted).
279. *See supra* Part I.C.1.b; *infra* Part I.C.3.b.
280. *See infra* notes 273-303 and accompanying text.
281. 421 S.E.2d 716 (Ga. 1992).
282. *Id.* Interestingly, the Honorable Clarence Cooper authored both the *Blackwell* and *Flournoy* decisions. Judge Cooper now sits as a United States District Court Judge for the Northern District of Georgia. The court's opinion in *Blackwell* does not mention *Flournoy*. *See id.* Moreover, one of the attorneys for the Georgia Real Estate Commission in Blackwell, the Honorable Beverly B. Martin, also presently sits as a United States District Court Judge for the Northern District of Georgia.
283. *Id.* at 717.
284. *Id.*
285. *Id.*
286. 399 S.E.2d 708 (Ga. Ct. App. 1990).

in holding that the broker could not re-litigate his claims.[287] The main difference between *Flournoy* and *Blackwell* was that the broker in *Blackwell* attempted to appeal the administrative decision of the Real Estate Commission to the superior court.[288] The court dismissed the appeal "for failure to comply with the procedures for discretionary appeals," and the broker did not challenge the dismissal.[289] Instead, the broker filed a separate lawsuit in superior court based on the same grounds.[290] The court of appeals considered this dismissal in the *Blackwell* decision.[291]

In determining that prior litigation precluded the broker from re-litigating his claims, the court held that he had previously litigated the same claims in the prior action before the Real Estate Commission.[292] Citing *Stiltjes*, the court held that "[a] judgment of a court of competent jurisdiction [is] conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the [action] wherein the judgment was rendered . . . ."[293] The court also held that, "for res judicata to bar re-litigation, the merits must have been adjudicated in the first action, the parties must be identical in the two actions, and the cause of action in the two [cases] must be the same."[294] The court determined that, because the Commission previously ruled on the merits of the exact issues presented in the case, because the parties to that action were the same, and because the superior court reviewed that decision, the lower court properly excluded the broker's claims.[295]

Although *Blackwell* brought Georgia law back on the path of preclusion, four subsequent decisions leading up to the decision in *Jordan v. Board of Public Safety*,[296] also validated the use of

287. *See id.*
288. *Compare* Flournoy v. Akridge, 400 S.E.2d 649 (Ga. Ct. App. 1990), *with* Blackwell v. Ga. Real Estate Comm'n, 421 S.E.2d 716 (Ga. Ct. App. 1992).
289. *Blackwell*, 421 S.E.2d at 717.
290. *See id.*
291. *Id.* at 717.
292. *Id.* at 717-18.
293. *Id.* at 717 (quoting Stiltjes v. Ridco Extermination Co., 399 S.E.2d 708 (Ga. Ct. App. 1990)).
294. *Id.* (citing *Stiltjes*, 399 S.E.2d at 709).
295. *Blackwell*, 421 S.E.2d at 717.
296. 559 S.E.2d 94 (Ga. 2002).

preclusion as a legal doctrine in Georgia.[297] In *Langton v. Department of Corrections*,[298] the court of appeals decided a case brought by a former state employee for wrongful termination.[299] The trial court granted summary judgment to the employer, and the employee appealed.[300] The Georgia Court of Appeals held that the superior court's denial of the employee's claim for unemployment benefits on the grounds that the employer terminated her for cause precluded the employee from bringing a wrongful termination suit.[301] It is important to note that an administrative law judge issued the prior administrative decision in *Langton* and that the Department of Labor's Board of Review and the superior court affirmed the decision.[302]

During 2000 and 2001, Georgia courts decided at least three cases involving preclusion.[303] In *Gwinnett County Board of Tax Assessors v. General Electric Capital Computer Services*,[304] the Supreme Court of Georgia discussed the doctrines of res judicata and collateral estoppel in the context of ad valorem property tax appeals.[305] The court held that the doctrine of collateral estoppel bars the re-litigation of a tax issue litigated in a prior tax year only when there has been no significant factual change and no change in the applicable law.[306] In *General Electric Capital Computer Services*, the Supreme Court affirmed the decision of the Court of Appeals, applying collateral estoppel because it found that there had been no intervening change or development in the law that would inhibit the application of the collateral estoppel doctrine.[307] In *Swain v. State*,[308] the court of

297. *See supra* notes 289-303 and accompanying text.
298. 469 S.E.2d 509 (Ga. Ct. App. 1996).
299. *Id.*
300. *Id.*
301. *Id.* at 510; *see also* Waldroup v. Green County Hosp., 463 S.E.2d 5 (Ga. 1995); Pinkard v. Morris, 450 S.E.2d 330 (Ga. 1994); Norris v. Atlanta & West Point R.R., 333 S.E.2d 835 (Ga. 1985).
302. Langton v. Dep't of Corrections, 469 S.E.2d 509, 510 (Ga. Ct. App. 1996).
303. Gwinnett County Bd. of Tax Assessors v. Gen. Elec. Capital Computer Serv., 538 S.E.2d 746 (Ga. 2000); Swain v. State, 552 S.E.2d 880 (Ga. Ct. App. 2001); Edmondson v. Gilmore, 554 S.E.2d 742 (Ga. Ct. App. 2001).
304. 538 S.E.2d 746 (2000).
305. *Id.*
306. *Id.* at 748.
307. *Id.* at 749.

appeals reaffirmed that the doctrine of collateral estoppel may be applicable in the context of criminal law.[309] The court held that the state was not collaterally estopped from presenting evidence at trial that the defendant refused to submit to a blood test for the presence of alcohol.[310] An administrative law judge found that the police officer who stopped the defendant for DUI failed to properly inform the defendant of her rights.[311] The *Swain* Court held that the state did not have a full opportunity to litigate the issue before the administrative law judge and thus declined to apply preclusion.[312] Finally, in *Edmondson v. Gilmore*,[313] the court of appeals decided an appeal of a petition by foster parents to adopt a child.[314] After the trial court dismissed the foster parents' case, the foster parents appealed.[315] Again, the court of appeals applied the doctrine of collateral estoppel to bar the foster parents' adoption petition because there was extensive prior litigation over the adoption of the child, during which the foster parents had a meaningful opportunity to participate.[316]

The decisions in *General Electric Capital Computer Services*, *Swain*, and *Edmondson* showed the viability of the collateral estoppel doctrine in Georgia if the required prerequisites—full and fair opportunity to litigate, identity of parties, and identity of issues—are present.[317] The *Langton* decision showed that collateral estoppel applies in the context of administrative decisions reviewed by Georgia courts.[318] However, in *Jordan v. Board of Public Safety*,[319] the court of appeals implicitly overruled the *Flournoy* decision, holding that an unreviewed administrative decision has a preclusive

308. 552 S.E.2d 880 (Ga. Ct. App. 2001).
309. *Id.* at 882-83.
310. *Id.* at 883.
311. *Id.*
312. *Id.*
313. 554 S.E.2d 742 (Ga. Ct. App. 2001).
314. *Id.*
315. *Id.* at 704.
316. *Id.* at 744-45.
317. *See generally* Gwinnett County Bd. of Tax Assessors v. Gen. Elec. Capital Computer Serv., 538 S.E.2d 746 (Ga. 2000); *Swain*, 552 S.E.2d 880 (Ga. Ct. App. 2001); *Edmondson*, 554 S.E.2d 742 (Ga. Ct. App. 2001).
318. Langton v. Dep't of Corrections, 469 S.E.2d 509 (Ga. Ct. App. 1996).
319. 559 S.E.2d 94 (Ga. Ct. App. 2002).

effect if the prerequisites for preemption are present.[320] Given that *Jordan* arose out of a tort and Section 1983 case and a prior public employment decision by an administrative body, it set the stage for the Eleventh Circuit's decision in the *Travers* case.[321]

In *Jordan*, the former superintendent of the state's police academy filed a lawsuit under 42 U.S.C. § 1983 and state tort law.[322] After Jordan obtained a judgment of $1,000,000 against the Board of Public Safety, the Board appealed.[323] In a cross-appeal, Jordan contended that the trial court erred by determining that the findings of fact entered by an administrative hearing officer regarding his termination collaterally estopped him from litigating.[324] The Board subsequently affirmed, but Jordan had not yet appealed the findings to court.[325] Jordan argued that the court should not give preclusive effect to the hearing officer's findings because the officer did not adjudicate the same issues in that hearing and because the Board denied him independent review of the hearing officer's decision.[326] The trial court "entered a complex ruling," giving preclusive effect to the hearing officer's factual findings but refusing to do the same for his conclusions of law.[327]

Citing *Edmondson*, *Swain*, *G.E. Capital Computer*, *Langton*, and *Blackwell*, the court of appeals ruled that the hearing officer's findings should have a preclusive effect, even though a court had not affirmed them.[328] Citing *Blackwell*, the court held that once an administrative body rules on questions of fact they are thereafter precluded from re-litigation by the doctrines of res judicata and estoppel by judgment.[329] The court analyzed the case at length and found that the parties were the same in both actions, the administrative body adjudicated the issues in question below, and the

320. *Id.*
321. *See id.*
322. *Id.* at 95.
323. *See id.*
324. *Id.*
325. *Jordan*, 559 S.E.2d at 95.
326. *Id.*
327. *Id.* at 96.
328. *Id.* at 96-97.
329. *Id.* at 97.

parties had a full opportunity to litigate the issues in question at that proceeding.[330] Citing *G.E. Capital Computer*, the court noted that collateral estoppel, unlike res judicata, does not require that the claims at issue in the two actions be the same.[331]

Throughout the development of Georgia law in this area, the prerequisites for applying the preclusion doctrine have remained basically the same.[332] Georgia courts require identity of the parties, identity of the claims (in some instances), actual adjudication below (in some instances), and a full and fair opportunity to litigate.[333] Some Georgia courts have also required that the issue or fact precluded be an essential portion of the prior "precluding" judgment.[334] However, a major issue in Georgia preclusion law has been whether a court must review and affirm the ruling of an administrative body to give it preclusive effect.[335] The *Flournoy* decision suggests, but does not conclusively state, that court review is necessary.[336] The decisions in *Woods* and *Garrett* suggest that court review is not necessary.[337] However, the *Jordan* decision left no doubt that Georgia law does not require court review if the other factors are present, particularly where there is identity of the parties (or their privies), where the parties actually litigated the issue below and where there was a fair opportunity to litigate the issue below.[338] Thus, the development of Georgia law set the stage for the *Travers* decision.

2. *The Eleventh Circuit's Decision in* Travers

In *Travers*, the court had to decide whether to reverse the decision of the district court and grant qualified immunity to CEO Jones and

330. *Id.* at 96-97.
331. *Jordan*, 559 S.E.2d at 96.
332. *See supra* Part I.C.1.b.
333. *Jordan*, 559 S.E.2d at 96.
334. *Id.*
335. *See supra* Part I.C.1.b.
336. *See* Flournoy v. Akride, 400 S.E.2d 649, 651-52 (Ga. Ct. App. 1990).
337. *See* Woods v. Delta Air Lines, Inc., 227 S.E.2d 376 (Ga. 1976) (declining to review state board workman's compensation); Garrett v. K-Mart Corp., 385 S.E.2d 302 (Ga. Ct. App. 1990).
338. *Jordan*, 559 S.E.2d at 96-97.

Fire Chief Wilder as to Mr. Travers' Section 1983 claims or to strip the individual defendants of their qualified immunity.[339] First, the court analyzed the criteria necessary for granting qualified immunity.[340] The parties did not dispute that Jones or Wilder acted within their discretionary authority as county officials.[341] Moreover, citing *Lee v. Ferraro*,[342] *Saucier v. Katz*,[343] and *Chesser v. Sparks*,[344] the court held that the plaintiff had the burden of showing that the conduct of Jones, Wilder or both violated a clearly established constitutional right.[345] Although the court agreed that the law clearly establishes that a public employer may not demote or discharge a public employee for engaging in protected speech, it also noted that an employer can legally discipline an employee for insubordination.[346] The court, quoting *Morris v. Crow*[347] and citing *Chesser*,[348] held that the First Amendment does not require public employers to tolerate embarrassing, vulgar, vituperative, or ad hominem attacks merely because an employee is waiving a political sign during the attack.[349]

Thus, the court concluded that the qualified immunity analysis depended upon the established facts of the case.[350] It stated:

> As presented to the district court, there was a sharp conflict between the plaintiff and the defendants as to what transpired at that time [during the confrontation between Travers and CEO Jones]. The district court properly determined that the merits of

339. Travers v. Jones, 323 F.3d 1294, 1295 (11th Cir. 2003).
340. *Id.*
341. *Id.*
342. 284 F.3d 1188, 1194 (11th Cir. 2002).
343. 533 U.S. 194 (2001).
344. 248 F.3d 1117, 1122 (11th Cir. 2001).
345. *Travers*, 323 F.3d at 1295.
346. *Id.* at 1295-96.
347. 117 F.3d 449, 458 (11th Cir. 1997).
348. 248 F.3d at 1125.
349. *Travers*, 323 F.3d at 1296.
350. *Id.* at 1295.

> the case turn on whether the plaintiff's or the defendants' version of the facts is correct.[351]

In so finding, the court applied the factual preclusion doctrine to determine what facts courts should analyze in doing the qualified immunity analysis.[352]

The court then held that the findings of the administrative hearing officer resolved the necessary issue of fact between the parties.[353] It then quoted the hearing officer's findings of fact that were binding in the subsequent Section 1983 litigation.[354] The court also noted that the hearing officer stated that his findings did not indicate any non-job-related factor or any errors of fact that would reverse the suspension by Chief Wilder.[355]

Citing *University of Tennessee v. Elliott*,[356] *Jordan v. Board of Public Safety*,[357] and *Blackwell v. Georgia Real Estate Commission*,[358] the court then put forth its central legal conclusions.[359] It stated:

> Those findings [of the hearing officer] are binding upon the court in a case such as this one if the employee received a full and fair

351. *Id.*

352. *See id.* at 1296. Jones and Wilder contended on appeal that, even if the doctrine of fact preclusion did not apply, they were entitled to summary judgment on the basis of qualified immunity. Travers v. Jones, No. 1:01-CV-1734-RLV, at 7 (N.D. Ga. June 18, 2002). CEO Jones contended that the court could not hold him liable because he had no involvement in Mr. Travers' suspension. *Id.* CEO Jones also argued that his involvement in the matter ended when he turned away from the confrontation and that Chief Wilder actually carried out the discipline. *Id.* at 4-5. The district court rejected this argument, stating that the altercation created "an inference" that CEO Jones was involved in the discipline. *Id.* at 11. Chief Wilder also contended that he should receive qualified immunity because there was no evidence that he was motivated by illegal retaliation or suppression of First Amendment rights when he disciplined Mr. Travers, especially since he never spoke with CEO Jones about the incident. *Id.* at 12-15. The district court also rejected this argument, reiterating that there was "an inference" of retaliation because, if Mr. Travers' version of the facts were believed (i.e., he had not been impolite or insubordinate), retaliation was the only possible reason for the discipline. *Id.*

353. Travers v. Jones, No. 1:01-CV-1734-RLV, at 7 (N.D. Ga. June 18, 2002).

354. *Travers*, 323 F.3d at 1296.

355. *See id.*

356. 478 U.S. 788, 799 (1986).

357. 559 S.E.2d 94, 97 (Ga. Ct. App. 1992).

358. 421 S.E.2d 716, 717 (Ga. Ct. App. 1992).

359. *Travers*, 323 F.3d at 1296.

> opportunity to present his case in the administrative hearing. When a state agency, acting in a judicial capacity, resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court. Under Georgia law, once an administrative body rules on questions of fact, the questions of fact are thereafter precluded from re-litigation. Contrary to the decision of the district court, it appears that Travers did receive a full and fair opportunity to litigate at an administrative hearing.[360]

Thus, the court determined that federal courts in Georgia must give preclusive effect to non-reviewed findings of fact by administrative agencies in subsequent Section 1983 litigation if the parties received a full and fair opportunity to litigate the factual issue before an administrative body.[361] Next, it dealt with Mr. Travers' primary contention, which was that he was not given a full and fair opportunity to litigate the claim before the administrative body.[362]

Mr. Travers contended that he did not receive a full and fair opportunity to litigate for two reasons.[363] First, he argued that the hearing officer's lack of subpoena power deprived him of the opportunity to fully and fairly litigate before that officer because two witnesses did not attend the hearing.[364] Second, he argued that he was

360. *Id.* (internal citations omitted).

361. *Id.* Mr. Travers did not argue that the issue in question was not litigated below, and he could not legitimately adopt a *Flournoy* argument that the hearing officer's determination dealt with different factual elements from those necessary in a Section 1983 case. *See, e.g.*, Brief for Appellee at 10-11, Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003) (No. 02-14043), *available at* 2002 WL 32174299. DeKalb County's Code required the hearing officer to determine whether a non-job-related factor led to the discipline. DEKALB, GA. CODE § 20-193(3) (1976) (on file with author). Thus, if preclusion applied, the hearing officer's determination that no non-job-related factor led to Mr. Traver's discipline automatically excluded a subsequent contrary factual ruling that the expression of his First Amendment rights motivated the discipline.

362. *Travers*, 323 F.3d at 1296. This argument tracked the district court's orders. He did not contend, for instance, that Georgia law did not allow for factual preclusion. *See generally* Brief for Appellee at 10-11, Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003) (No. 02-14043), *available at* 2002 WL 32174299.

363. *Travers*, 323 F.3d at 1296-97.

364. *See id.* at 1297.

unable to subpoena CEO Jones for cross-examination.[365] The Eleventh Circuit did not find either argument persuasive.[366] It addressed these arguments with three strong points of its own. First, the court noted that the failure of the witnesses to appear resulted, at least in part, from Mr. Travers' own failure to timely request that the witnesses appear for the hearing.[367] Thus, Mr. Travers' untimely request for the presence of the witnesses was ineffective because it did not comply with DeKalb County's administrative procedures.[368] The court also found that the two witnesses in question would not have changed the outcome of the factual finding of the hearing officer because they were not able to testify about Chief Wilder's subjective intent in disciplining Mr. Travers.[369] Thus, their testimony "would not have likely changed the outcome of the County administrative appeal or this appeal."[370]

Citing *Amundsen v. Chicago Park District*,[371] *Calvin v. Chater*,[372] and *DeLong v. Hampton*,[373] the panel also concluded that a party has no right to subpoena witnesses to state administrative hearings.[374] The court's ruling appears to be the first by a panel of the Eleventh Circuit on this issue. Although the panel utilized a slightly different approach to this issue than that advocated by appellants Jones and Wilder, its approach was nonetheless well-reasoned and effective.[375]

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365. *Id.* at 1296-97.
366. *See id.*
367. *Id.* at 1297.
368. *See id.*
369. *Travers*, 323 F.3d at 1297.
370. *Id.* at 1296-97.
371. 218 F.3d 712, 717 (7th Cir. 2000).
372. 73 F.3d 87, 92 (6th Cir. 1996).
373. 422 F.2d 21, 24-25 (3rd Cir. 1970).
374. *Travers*, 323 F.3d at 1297.
375. *See id.* at 1294. The individual defendants argued that pursuant to *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 481-82 (1982), a "full and fair opportunity to litigate" was synonymous with satisfaction of "minimum procedural requirements of the Fourteenth Amendment Due Process Clause." Brief for Appellant at 28-29, Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003) (No. 02-14043), *available at* 2002 WL 32174299 (citing *Kremer*, 456 U.S. at 481-82). They then reasoned that Mr. Travers could have appealed the hearing officer's ruling pursuant to Georgia's certiorari procedure, thus correcting any alleged procedural defects regarding the compulsory process. *Id.* at 31 (citing O.C.G.A. § 5-4-1 (Supp. 2004)). Assuming that there were procedural defects in the administrative hearing process, Georgia law provided a remedy for their correction that Travers did not choose to utilize. *Travers*, 323 F.3d at 1294. Citing *Hearn v. Bd. of Public Educ.*, 191 F.3d 1329, 1332 (11th Cir. 1999) and *McKinney*

Finally, the panel ruled that, because Mr. Travers had a full and fair opportunity to litigate the factual issues at the administrative hearing, the federal court must give the hearing officer's findings of fact preclusive effect.[376] Thus, Mr. Travers could not re-litigate the factual issues in the case, and both CEO Jones and Chief Wilder had a qualified immunity.[377] Mr. Travers then filed a petition for rehearing and a petition for hearing en banc.[378] However, on May 29, 2003, the panel denied Mr. Travers' motion for rehearing and the petition for hearing en banc.[379] Mr. Travers then filed a petition for certiorari to the U.S. Supreme Court.[380] On November 3, 2003, the U.S. Supreme Court denied Mr. Travers' petition for certiorari, thus allowing the Eleventh Circuit panel's decision in *Travers* to stand.[381]

3. *Post*-Travers *Decisions*

There have been at least two significant decisions issued by federal courts relating to preclusion issues since the decision in *Travers*.[382]

a. Bishop v. City of Birmingham[383]

On May 2, 2003, United States District Judge William M. Acker, Jr. issued a memorandum opinion in the case of *Bishop v. City of Birmingham*.[384] Plaintiff Bishop, an African-American former

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v. Pate, 20 F.3d 1550 (11th Cir. 1994), the defendants argued that Mr. Travers' failure to show an inadequate state remedy for the procedural defects he alleged was an absolute bar to any procedural due process claims under the Fourteenth Amendment. *Id.* at 32. The failure also barred him from complaining of these alleged defects to avoid preclusion. Although the panel did not adopt this argument, it remains a viable avenue for local government defendants seeking to avoid a finding that their administrative process did not afford them a full and fair opportunity to litigate an issue.

376. *Travers*, 323 F.3d at 1297.

377. *Id.* The same panel of judges that issued the *Travers* decision authored *Community Bank of Homestead v. Torcise*, 162 F.3d 1084 (11th Cir. 1998) (upholding the preclusive effect of the collateral estoppel doctrine). The *Torcise* case was a Florida-based decision involving bankruptcy issues.

378. *See* Travers v. Jones, No. 02-14043, 69 Fed. Appx. 992, 2003 U.S. App. LEXIS 21906 (11th Cir. May 29, 2003).

379. *See id.*

380. *See* Travers v. Jones, 540 U.S. 984 (2003).

381. *See id.*

382. *See infra* Parts I.C.3.a-c.

383. 260 F. Supp. 2d 1149 (N.D. Ala. 2003).

384. *See id.*

Birmingham police officer, filed suit claiming that the city terminated him as an act of racial discrimination and in retaliation for his earlier complaints about racial discrimination.[385] He alleged claims pursuant to Title VII and 42 U.S.C. §§ 1981 and 1983.[386] The city filed a motion for summary judgment alleging that the Jefferson County Personnel Board had heard the evidence and determined that the officer did merit firing.[387]

Ultimately, the court determined that the decision in *Travers* was binding, and it applied the preclusion doctrine even though there was, at the time, a pending application for rehearing and rehearing en banc.[388] The court held that factual preclusion applied, even though the board did not have jurisdiction to consider Title VII claims, because the Personnel Board did have the jurisdiction to hear and decide disputed questions of fact that "lead inexorably to a final decision" on the Title VII claim.[389] The court held that the board's findings established as a matter of fact that the "City's articulated reasons [for its decision] were not pretextual," but were instead legitimate reasons for terminating Bishop.[390] The court in *Bishop* noted that the *Travers* case was "startlingly similar" to the *Bishop* case and also noted that Bishop had "spent all of his time before the Personnel Board trying to prove that his termination was an act of race discrimination and/or retaliation for his earlier claims of discrimination."[391]

However, Judge Acker's decision did not withstand appeal.[392] In *Bishop v. City of Birmingham Police Department*, the Eleventh Circuit held that although a state administrative agency's factual findings have a preclusive effect in proceedings brought under 42 U.S.C. § 1983, Congress did not intend state administrative proceedings to have a preclusive effect in Title VII litigation if a

385. *Id.* at 1149-50.
386. *Id.* at 1150.
387. *See id.*
388. *Id.* at 1152.
389. *Bishop*, 260 F. Supp. 2d at 1152.
390. *See id.* at 1153.
391. *See id.* at 1151, 1154.
392. Bishop v. City of Birmingham Police Dep't, 361 F.3d 607 (11th Cir. 2004).

court of law did not review them.[393] Thus, the Eleventh Circuit reversed and remanded the district court's decision.[394] In its holding, the Eleventh Circuit panel specifically pointed to the language of the Supreme Court's decision in *Elliott*, which noted the statutory framework set up by Congress in Title VII.[395] The panel found, as did the Supreme Court in *Elliott*, that "Title VII requires the EEOC to give substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law."[396] Both courts determined that this provision would make little, if any, sense if Congress intended for state agency provisions to have a preclusive effect in Title VII actions in federal court.[397] The Eleventh Circuit panel thus concluded that the *Travers* decision did not have any bearing on the *Bishop* case because it involved claims under 42 U.S.C. § 1983, rather than under Title VII.[398] Presumably, had the plaintiff in *Bishop* appealed the administrative decision to state court and lost, the doctrine of preclusion would have bared his claims.

b. Foxy Lady, Inc. v. City of Atlanta[399]

During 2003, the Eleventh Circuit also decided *Foxy Lady, Inc. v. City of Atlanta*.[400] *Foxy Lady, Inc.* is significant because, after discussing *Travers*, the court reinforced the *Travers* decision regarding the necessity of subpoenas in administrative hearings in Georgia.[401] In particular, the court issued the following ruling:

> We agree that reasonable limitations may be placed in the number and scope of witnesses that may be compelled to testify at an administrative hearing. Therefore, we also agree with

393. *See id.* at 610.
394. *Id.*
395. *Id.* at 609-10.
396. *See id.* at 609 (quoting 42 U.S.C. § 2000e-5(b) (2000)).
397. *See id.* at 610.
398. *Bishop*, 361 F.3d at 610.
399. 347 F.3d 1232 (11th Cir. 2003).
400. *Id.*
401. *See id.* at 1236-37.

> *Travers* that no absolute or independent right to subpoena witnesses exists during administrative proceedings, and now hold expressly that procedural due process also does not require an absolute or independent right to subpoena witnesses in administrative hearings.[402]

c. Quinn v. Monroe County[403]

(i) The Quinn *Decision*

A panel of the Eleventh Circuit Court of Appeals issued the other significant post-*Travers* decision in *Quinn v. Monroe County*.[404] The *Quinn* decision, which cites to both the *Travers* and *Elliott* decisions, applies the collateral estoppel doctrine to the termination of a Monroe County, Florida library director.[405] In *Quinn*, after the county terminated her employment, the plaintiff alleged that her termination constituted retaliation for exercising her First Amendment right to free speech concerning certain public library issues.[406] The county administrator terminated Quinn, and she appealed her termination to the "Career Service Council."[407] After a three-day adversarial hearing, the Council affirmed Quinn's termination and issued several key factual findings, including that she participated in misconduct that constituted just cause for discharge.[408] Quinn petitioned for certiorari review of the council's decision before the local circuit court, but the circuit court ultimately found in favor of Monroe County.[409]

In subsequent federal litigation, both Monroe County and its county administrator contended that collateral estoppel applied to the administrative appeal, thus requiring the dismissal of the Section

402. *Id.* at 1237.
403. 330 F.3d 1320 (11th Cir. 2003).
404. *Id.*
405. *Id.* at 1323.
406. *Id.* at 1324.
407. *Id.* at 1323.
408. *See id.*
409. *Quinn*, 330 F.3d at 1323.

1983 litigation.[410] Essentially, they both contended that the council's finding of a legitimate non-retaliatory reason for the termination precluded suit on the grounds that retaliation was the primary reason for the decision.[411] The Eleventh Circuit panel, after ruling on two other issues, concluded that Quinn was not collaterally estopped from bringing her Section 1983 claims against the county administrator in his individual capacity.[412] The panel based its decision primarily on Florida law.[413]

The *Quinn* panel initially noted that the collateral estoppel issue was the "thorniest question" presented on appeal and amounted to a "bramble bush" issue.[414] It then ruled that collateral estoppel[415] did not bar Quinn from asserting her claims against the county administrator in his individual capacity.[416] The panel first determined that the Council acted in a judicial capacity in issuing its ruling and that the state court reviewed and affirmed the council's fact-findings.[417] Noting the prior Eleventh Circuit decisions in *David Vincent, Inc. v. Broward County*[418] and *Shields v. BellSouth Advertising & Publishing Co.*,[419] the Court held that judgments of state courts generally have a preclusive effect under the doctrine of collateral estoppel or issue preclusion when (1) the courts of the state from which the judgment emerged would do so themselves and (2) the litigants had a full and fair opportunity to litigate their claims and

410. *Id.* at 1328.
411. *Id.*
412. *Id.* at 1325.
413. *Id.*
414. *Id.* at 1325, 1328.
415. A point of distinction between *Quinn* and *Travers* is that the *Quinn* panel applied the doctrine of collateral estoppel, whereas the *Travers* panel applied the factual preclusion doctrine formulated in *Elliott*, which has its genesis in the collateral estoppel doctrine. *Compare Quinn*, 330 F.3d at 1328-30, *with* Travers v. Jones, 323 F.3d 1294, 1295 (11th Cir. 2003).
416. *See Quinn*, 330 F.3d at 1325. The *Quinn* panel did not decide whether collateral estoppel would bar Quinn's claims against Monroe County because it dismissed the claims against the county before reaching the collateral estoppel issue. *See id.* at 1333. However, the opinion suggests that collateral estoppel would have precluded claims against the local government. *See generally id.* at 1320.
417. *Id.* at 1329.
418. 200 F.3d 1325 (11th Cir. 2000).
419. 228 F.3d 1284 (11th Cir. 2000).

the prior state proceedings otherwise satisfied applicable due process requirements.[420]

The panel then analyzed whether, under Florida law, collateral estoppel would apply to the fact-finding decision regarding the claims against the county administrator in his individual capacity.[421] Citing *Community Bank of Homestead v. Torcise*[422] and several Florida decisions, the court determined that collateral estoppel applies under Florida law if "(1) an identical issue, (2) has been fully litigated, (3) by the same parties or their privies, and (4) a final decision has been rendered by a court of competent jurisdiction."[423] The panel focused on the third element in deciding not to apply collateral estoppel, thus allowing the claims against Monroe County's county administrator in his individual capacity to proceed.[424]

The panel reviewed Florida's law at length to determine whether, under Florida law, Florida courts would have held the county administrator "a party or its privy" so as to apply collateral estoppel.[425] First, the court determined that under Florida law a party must show that the party or privy requirement, otherwise known as the mutuality requirement, applies to collateral estoppel.[426] After noting two diverging lines of cases in Florida on requiring mutuality, the panel ultimately decided "this difficult interpretative question concerning Florida collateral estoppel law" by holding that the case of *J.K.C. v. Katz*[427] was the clearest and most recent expression of Florida law in this area.[428] In addition, it noted that the *Katz* decision required application of the mutuality requirement to apply collateral estoppel to subsequent litigation.[429] The panel then decided that the

420. *Quinn*, 330 F.3d at 1329. The *Quinn* panel discussed the *Travers* decision approvingly in footnote 14 of its decision. *Id.* at 1333 n.14.

421. *Id.* at 1328-29.

422. 162 F.3d 1084 (11th Cir. 1998). The same panel that authored the decision in *Travers* also authored the decision in *Torcise*, in which the Eleventh Circuit applied collateral estoppel to bankruptcy law. *See Torcise*, 162 F.3d at 1084; Travers v. Jones, 323 F.3d 1295 (11th Cir. 2003).

423. *Quinn*, 330 F.3d at 1329.

424. *See id.* at 1333.

425. *Id.* at 1329-33.

426. *Id.* at 1330.

427. 731 So. 2d 1268 (Fla. 1999).

428. *Quinn*, 330 F.3d at 1332-33.

429. *Id.*

county administrator was not a party or privy under Florida law because his name did not appear in the caption of the administrative hearing pleadings in the earlier case.[430] Thus, the panel refused to apply collateral estoppel to bar the claims against the county administrator.[431]

(ii) Application of the Quinn *Decision in Georgia*

If parties in a Georgia case such as *Travers* raised the issues that the parties raised in the *Quinn* case, would the Eleventh Circuit reach the same conclusion as was reached in *Quinn*? The answer to this question may be: not necessarily.

In footnote eight of the *Quinn* decision, the panel appears to indicate that, to apply the doctrine of collateral estoppel to bar claims, a court must satisfy all of the federal elements of applying collateral estoppel and all of the forum state's requirements to the application of the collateral estoppel doctrine.[432] If so, Georgia law also probably requires the application of the party or privy mutuality requirement under the decisions of the Georgia Supreme Court in *Waldroup v. Greene County Hospital Authority*,[433] *Norris v. Atlanta & West Point Railroad*,[434] *Department of Human Resources v. Fleeman*,[435] and *Kent v. Kent*.[436] That parties must satisfy the mutuality requirement under Georgia law to apply collateral estoppel is abundantly clear after the Georgia Court of Appeals decision in *Wickliffe v. Wickliffe Co.*[437]

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430. *Id.* at 1330. The *Quinn* decision gives the impression that parties did not heavily brief this issue or present much evidence on it. *Id.* at 1333 n.15. For this reason, the party or privy issue may arise in subsequent litigation.

431. *See id.*

432. *See id.* at 1329 n.8. In its ruling, the *Quinn* panel cited to *Wood v. Kesler*, 323 F.3d 872, 879-80 (11th Cir. 2003), *Brown v. City of Hialeah*, 30 F.3d 1433, 1437 (11th Cir. 1994), and *Vazquez v. Metro. Dade County*, 968 F.2d 1101, 1108 (11th Cir. 1992).

433. 463 S.E.2d 5, 7 (Ga. 1995).

434. 333 S.E.2d 835, 838 (Ga. 1985).

435. 439 S.E.2d 474, 475 (Ga. 1994).

436. 452 S.E.2d 764, 766 (Ga. 1995).

437. 489 S.E.2d 153, 155 (Ga. Ct. App. 1997); *see also* Farred v. Hicks, 915 F.2d 1530, 1533 (11th Cir. 1990) (refusing to bar an arrestee's claim based on collateral estoppel because the police officers failed to satisfy the mutuality requirement).

In *Wickliffe*, the full Georgia Court of Appeals decided a case involving breach of contract, guarantee, indemnity, and contribution claims by a purchaser of a corporation against the sole shareholder of the selling corporation.[438] The trial court denied summary judgment to the selling shareholder and, sua sponte, granted partial summary judgment to the purchasing corporation, holding that "an unrelated federal action" had preclusive effect on the case under the doctrine of collateral estoppel.[439] After a general discussion of the doctrine of collateral estoppel, the court of appeals noted that mutuality was lacking in the case.[440] Thus, "the underlying question [on which the case turned] was whether the mutual identity of the parties is required for collateral estoppel in Georgia."[441]

The court noted that its prior decisions on the issue followed two divergent trends.[442]

> The modern trend in applying the doctrines of res judicata and collateral estoppel is to confine the privity requirement to the party against whom the plea is asserted, so as to permit one who is not a party to the judgment to assert the judgment against a party who is bound by it . . . .[443]

The court also noted that another line of cases decided during the same time frame followed the "traditional rule that requires [the] identity of the parties or their privies in both actions."[444] The court decided to abide by the traditional rule and thus overruled its decisions in *Ervin v. Swift Adhesives*,[445] *Watts v. Lippitt*,[446] *Winters v. Pund*,[447] and *Wilson v. Malcolm T. Gilliland, Inc.*[448] The court based

438. *Wickliffe*, 489 S.E.2d at 155. Five judges concurred in the opinion, whereas Judges Andrews, McMurray, Birdsong, and Beasley concurred in the judgment only. *Id.* at 157.
439. *Id.* at 154.
440. *Id.* at 156.
441. *Id.* at 155-56.
442. *Id.*
443. *Wickliffe*, 489 S.E.2d at 155.
444. *Id.* at 156.
445. 430 S.E.2d 133 (Ga. Ct. App. 1993).
446. 320 S.E.2d 581 (Ga. Ct. App. 1984).
447. 346 S.E.2d 124 (Ga. Ct. App. 1986).

its decision on the fact that the Georgia Supreme Court had remained consistent in applying the traditional rule.[449]

Thus, the court decided that it was "constrained to follow the Supreme Court" and require the identity of parties for the application of collateral estoppel.[450] Moreover, the court "encourage[d]" the Georgia Supreme Court to adopt the modern trend when it next addressed this issue.[451] In support of its encouragement, the *Wickliffe* court noted that in the *Kent* case the Supreme Court cited approvingly to sections of the Second Restatement of Judgments, which does not require mutuality before precluding parties from re-litigating an issue they have already litigated and lost.[452]

Initially, the *Wickliffe* and *Quinn* decisions appear to give plaintiffs an easy way around the *Travers* decision.[453] The factual scenario in *Quinn*, in which either the governmental entity or the decision-maker but not both is named in the caption to the civil service pleadings, is often the rule in Georgia.[454] The *Wickliffe* decision could provide plaintiffs or defendants with a powerful tool that could, when coupled with the *Quinn* decision, prevent application of the *Travers* "fact-preclusion" doctrine to one or more of the parties to a case. However, with a little effort parties can blunt this mutuality tool so as to restore power to the *Travers* decision.

First, one can argue that the mutuality requirement does not apply to the *Travers* decision because the court in *Travers* based the decision upon the federal common law doctrine of fact preclusion created by the Supreme Court in *Elliott*, rather than on the doctrine of collateral estoppel.[455] Additionally, one could allege that mutuality of parties is less important in the fact preclusion doctrine than in the

448. 402 S.E.2d 291 (Ga. Ct. App. 1991); *see Wickliffe*, 489 S.E.2d at 156.

449. *See Wickliffe*, 489 S.E.2d at 155 (citing Kent v. Kent, 452 S.E.2d 764 (Ga. 1995); Waldroup v. Greene County Hosp. Auth., 463 S.E.2d 5 (Ga. 1995); Dep't of Human Res. v. Fleeman, 439 S.E.2d 474 (Ga. 1994); Norris v. Atlanta & West Point R.R., 333 S.E.2d 835 (Ga. 1985)).

450. *Id.* at 156.

451. *Id.*

452. *Id.*

453. The plaintiff in Travers did not raise the mutuality issue before the Eleventh Circuit. Travers v. Jones, 323 F.3d 1294, 1295 (11th Cir. 2003).

454. *See* Quinn v. Monroe County, 330 F.3d 1320, 1330 n.11 (11th Cir. 2003).

455. *Travers*, 323 F.3d at 1296.

doctrine of collateral estoppel. However, this argument may be of limited value when coupled with some of the arguments described below.[456] Plaintiffs, however, will rightfully point to the fact that the *Elliott* court created the fact preclusion doctrine using collateral estoppel principles.[457]

Second, one can argue that parties should not use the *Quinn* case as binding precedent for determining whether mutuality of parties exists or that the parties to the later litigation were privies of the party on the caption in the administrative hearing. The *Quinn* court based its analysis solely upon the fact that the party at issue was not in the caption at the prior administrative hearing, which that defendant sought to use as preclusive authority.[458] However, it is clear from the decision that the parties did not present extensive evidence or arguments.[459] One might argue that other factors, such as whether one party is employed by another party to the case, should determine mutuality.

Georgia courts generally allow satisfaction of the mutuality element by the privies of the parties.[460] As the Georgia Supreme Court has held, a privy is "one who is represented at trial and who is in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right."[461]

Certainly, one could quite credibly argue that both a supervisor and a governmental entity have an identity of interest in an administrative hearing regarding an employment decision because an administrative hearing tribunal's judgment represents the same legal right as to both.[462]

Third, the mutuality requirement is presently far from solidified in the law. Both the *Quinn* and *Wickliffe* courts wrestled with the

456. *See infra* text accompanying notes 457-68.
457. *See* Univ. of Tenn. v. Elliott, 478 U.S. 788 (1986).
458. *Quinn*, 330 F.3d 1320, 1330 (11th Cir. 2003).
459. *See id.* at 1330 n.15.
460. Simmons v. State, 579 S.E.2d 735 (Ga. 2003).
461. *Id.* at 737 (quoting Butler v. Turner, 555 S.E.2d 427 (Ga. 2001)); *see also* Jordan v. Bd. of Pub. Safety, 559 S.E.2d 94 (Ga. 2002).
462. *See, e.g.*, Shuster v. Martin, 861 F.2d 1369, 1373 (5th Cir. 1988).

mutuality requirement because both Florida and Georgia courts have not unanimously applied the mutuality requirement.[463] Although the Georgia Court of Appeals ultimately concluded in *Wickliffe* that mutuality was a requirement in Georgia, it urged the Supreme Court to revisit this issue and do away with the requirement, at least in certain circumstances.[464] Moreover, the *Wickliffe* Court noted that the Georgia Supreme Court cited approvingly to sources that do not apply the mutuality requirement.[465] It is well within the realm of possibility that Georgia might adopt the more modern view in the future and do away with the mutuality requirement in some or all instances.[466]

Finally, should a local government desire to assure that officers, employees, and supervisors have the advantages of the preclusive effects of a civil service hearing pursuant to *Travers*, it should add the decision-maker and any other persons with substantive involvement to the caption in its administrative hearing process.[467] This simple solution allows supervisors and officers to point to *Quinn* as authority for affording decision-makers and supervisors the same advantages of fact preclusion that are available to local governments under *Travers*. Because local governments control the captions of the pleadings in their administrative hearings, they should enact administrative rules requiring that supervisors, decision-makers, or

463. *See Quinn*, 330 F.3d at 1329-33; Wickliffe v. Wickliffe Co., 489 S.E.2d 153, 156 (Ga. Ct. App. 1997).

464. *See Wickliffe*, 489 S.E.2d at 156. In particular, there is a distinction between the "offensive" use of the doctrine of collateral estoppel, in which the mutuality element is more often a requirement, and the "defensive" use of collateral estoppel where the mutuality element is a requirement less often. *See Quinn*, 330 F.3d at 1330-31. The distinction between the two appears to be mainly that offensive collateral estoppel occurs when a plaintiff attempts to use a ruling to foreclose defenses that a defendant could assert, whereas defensive collateral estoppel involves using a past ruling to defend against subsequent claims.

465. *Wickliffe*, 489 S.E.2d at 156.

466. *See* Allen v. McCurry, 449 U.S. 90, 94-95 (1980) (noting that in recent years the U.S. Supreme Court has "eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided earlier in federal-court suits" and citing Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971)).

467. *Quinn*, 330 F.3d at 1330.

both be "parties" and included in the captions of administrative hearings along with the local government.[468]

II. THE SIGNIFICANCE OF THE *TRAVERS* DECISION

While on its face the *Travers* decision may seem unremarkable given the solid federal and state law underpinning the decision, the decision should be significant in the area of public employment litigation in Georgia.[469] This is particularly true when one views the decision along with other applicable case law.[470]

A. Monell *and its Progeny*

The most interesting and immediate change in public employment law arises when one considers the *Travers* decision in context with the decision of the U.S. Supreme Court in *Monell v. Department of Social Services of New York*[471] and its progeny.[472] In *Monell*, the Supreme Court ruled that respondeat superior liability does not apply in the context of Section 1983 litigation.[473] Instead, the Supreme Court required that a plaintiff in Section 1983 litigation demonstrate that the custom, policy, or practice of a local government caused the deprivation of constitutional rights at issue to hold the local government liable.[474] In other words, an individual employee of a local government acting under color of state law can be liable for a constitutional violation under 42 U.S.C. § 1983.[475] However, the local government is liable for that employee's actions only if the employee implemented or followed a policy, custom, ordinance, practice, or regulation of the local government.[476]

468. Because both the plaintiff and defendants can use the *Travers* decision, the addition of supervisors and relevant officials is not without risk. Each local government should carefully evaluate its own system to determine whether the risk is worth the potential benefit.

469. *See generally* Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003).

470. *See supra* Part III.A.

471. 436 U.S. 658 (1978).

472. *Id.*

473. *Id.* at 691.

474. *Id.* at 694.

475. *Id.* at 682.

476. *Id.* at 691-92.

There has been a great deal of litigation over what acts can create local government liability under the standards expressed by the Supreme Court in *Monell*.[477] However, in pressing their cases under Section 1983 employment, plaintiffs have frequently cited to court rulings where the actions of a single employee in a single instance can amount to policy-making.[478] Under this theory, liability generally applies to the local government if it grants the employee or official in question policy-making authority, particularly as to the act at issue.[479]

Following the Supreme Court's lead, the Eleventh Circuit has greatly restricted the number of officials whose actions can directly lead to local government liability, particularly in the employment context.[480] In *City of St. Louis v. Praprotnik*,[481] a plurality of the Supreme Court held that an official with the power to initiate personnel decisions is not a final policymaker creating Section 1983 liability if his decisions are subject to meaningful administrative review.[482] Since *Praprotnik*, the Eleventh Circuit has consistently held that a municipal or county official does not have final policymaking authority for purposes of *Monell* analysis over a particular subject matter when that official's decisions are subject to meaningful administrative review.[483] The *Travers* decision takes on additional significance when coupled with the Eleventh Circuit's decisions in *Scala* and *Morro*.

In *Scala*, the plaintiff, a firefighter and paramedic who worked for the City of Winter Park, alleged that the City terminated him in violation of his First Amendment rights to free speech and free association.[484] The public safety director-fire chief, in consultation

477. *See infra* notes 462-71 and accompanying text.

478. *See, e.g.*, McMillian v. Monroe County, 520 U.S. 781, 784-85 (1997) (citing the *Monell* rule).

479. *See, e.g., id.*; Pembaur v. City of Cincinnati, 475 U.S. 469, 480-83 (1986) (stating that only those municipal officials who have final policymaking authority may subject the municipality to Section 1983 liability for their actions).

480. *See* Scala v. City of Winter Park, 116 F.3d 1396 (11th Cir. 1997); Morro v. City of Birmingham, 117 F.3d 508 (11th Cir. 1997).

481. 485 U.S. 112, 117 (1986).

482. *Id.*

483. *See Scala*, 116 F.3d at 1402-03; *Morro*, 117 F.3d at 514.

484. *Scala*, 116 F.3d at 1397-98.

with the city manager, made the decision to terminate the plaintiff.[485] The plaintiff appealed his termination to the City's civil service board, which upheld the termination after a hearing.[486] The plaintiff then filed suit under Section 1983 and the trial court granted summary judgment.[487] After reviewing numerous post-*Praprotnik* decisions, the Eleventh Circuit concluded that the City could not be liable because the decision of the public safety director-fire chief and city manager was subject to review by the civil service board and thus could not have constituted final policy-making.[488] Since issuing *Scala*, the Eleventh Circuit held in *Denno v. School Board of Volusia County*[489] that the *Scala* decision serves as the circuit's "compass in the area of determining whether officials act with final policymaking authority so as to trigger entity liability under *Monell*."[490]

The *Scala* and *Travers* decisions present the potential Section 1983 public employment plaintiff with a vexing problem if the employee possesses civil service appeal rights or other rights to administrative review of employment decisions.[491] The employee could contest his or her discipline through an administrative appeal.[492] However, under *Travers* the factual findings of the administrative body would be preclusive in subsequent Section 1983 litigation.[493] If the employee wins his administrative appeal, the findings could be a great boon in subsequent litigation. However, if the employee loses the

485. *Id.* at 1398.
486. *Id.*
487. *Id.*
488. *Id.* at 1402-03; *see* Hill v. Clifton, 74 F.3d 1150, 1152 (11th Cir. 1996) (conceding that the city policy chief was not the final policymaker with respect to employment decisions since the city manager could reverse his decisions); Martinez v. City of Opa-Locka, 971 F.2d 708, 714 (11th Cir. 1992) (finding that final policymaking authority existed where the city manager's decision to hire or fire administrative personnel is completely insulated from review); Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 637 (11th Cir. 1991) (holding that a mayor was not a final policymaker with respect to zoning decisions where the city charter provided that the city counsel could override the mayor's veto of zoning ordinances); Mandel v. Doe, 888 F.2d 783, 792-94 (11th Cir. 1989) (recognizing that a municipal officer has final policymaking authority when his decisions are not subject to review and holding that discretionary review initiated by the municipal officer himself does not prevent the official from being a final policymaker).
489. 218 F.3d 1267 (11th Cir. 2000).
490. *Id.* at 1276.
491. *See generally Scala*, 116 F.3d at 1396; Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003).
492. *Travers*, 323 F.3d at 1294.
493. *Id.*

administrative appeal, he could, like Mr. Travers, risk factual findings that could preclude subsequent Section 1983 litigation.[494] On the other hand, the employee could not file Section 1983 litigation against the local government because, under *Scala*, a means for administrative review of the decision to discipline employees existed.[495] In this instance, an employee could only bring Section 1983 litigation against the official in his or her individual capacity.[496] This choice can become difficult given the sometimes short time frame in which employees must decide whether to file an administrative appeal.

In sum, given the application of the *Travers* and *Scala* decisions, public employees with appeal rights should familiarize themselves with the administrative appeal process in order to decide whether an administrative appeal would be the most attractive option in contesting employment decisions. Employees no longer have the unfettered right to pursue remedies on two different levels, hoping for relief from either the administrative hearing process or the courts.[497] As a consequence, Section 1983 litigation may soon become the forum of choice for public employees without appeal rights, rather than those with administrative appeal rights.

B. Discovery

Under the *Travers* decision, a stay on discovery may be appropriate early on in many Section 1983 cases. A defendant could request a stay on discovery to seek a ruling from the court clarifying the scope of discovery given the preclusive effect of prior administrative findings of fact.[498] In addition, an early motion for summary judgment filed by a defendant claiming that, under *Travers*, the court should dismiss the case due to the prior findings of fact of

494. *See id.*

495. *Scala*, 116 F.3d at 1397.

496. *See id.* at 1401. This avenue may be particularly unattractive if the local government does not have a policy, resolution, or ordinance allowing it to indemnify employees or if it has a policy or ordinance which limits or caps indemnification of employees at a certain amount.

497. *See Travers*, 323 F.3d at 1294; *Scala*, 116 F.3d at 1396.

498. *See* FED. R. CIV. P. 26(c)(4).

the administrative body may warrant a stay.[499] In this instance, grounds for a stay may include judicial economy and the wise use of the court's time and resources. A defendant could also file a summary judgment motion, request a stay, and then ask that the court clarify any remaining discovery issues for any portion of the case that the court does not dismiss.

A stay in discovery also may be appropriate with a motion to dismiss based upon qualified immunity. Immunity is generally a defense that the Supreme Court affords special consideration.[500] In the cases of *Harlow v. Fitzgerald*,[501] *Mitchell v. Forsyth*,[502] *Anderson v. Creighton*,[503] and *Stump v. Sparkman*,[504] the U.S. Supreme Court issued rulings that justified the filing of an early motion to dismiss on the basis of the qualified immunity defense, which applies in nearly every Section 1983 case filed against individual local government employees or officials. In these instances, a motion to stay discovery is also appropriate given the fact that, in *Harlow* and its progeny, the Supreme Court held that a defendant claiming qualified immunity also has the right to avoid excessive discovery and that immunity protects these defendants from the costs of litigation and wide-ranging or time-consuming discovery.[505] The point is that individual local government employees or officials can combine a motion to dismiss on the basis of qualified immunity with a motion for summary judgment or dismissal due to preclusion issues under *Travers*.[506] Moreover, they can link a motion to stay or shape discovery on the basis of *Travers* factual preclusion with a motion to stay discovery when asserting an early defense of qualified immunity.[507]

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499. *See Travers*, 323 F.3d at 1296.

500. *See generally* Anderson v. Creighton, 483 U.S. 635 (1987); Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Stump v. Sparkman, 435 U.S. 349 (1978).

501. 457 U.S. 800 (1982).

502. 472 U.S. 511 (1985).

503. 483 U.S. 635 (1987).

504. 435 U.S. 349 (1978).

505. *Harlow*, 457 U.S. at 818.

506. Travers v. Jones, 323 F.3d 1294, 1296 (11th Cir. 2003).

507. *See id.* The defendant can appeal the denial of an early motion to dismiss grounded in qualified immunity under the decisions of the Supreme Court and the Eleventh Circuit. *See* Mitchell v. Forsyth,

C. *Subpoenas in Administrative Hearings*

One practical aspect of the *Travers* ruling is that it validates the administrative hearing process even where no subpoena power exists. Citing *Amundsen v. Chicago Park District*,[508] *Calvin v. Chater*,[509] and *DeLong v. Hampton*,[510] the *Travers* court ruled that a party has no right to subpoena witnesses to state administrative hearings.[511] Although the U.S. Supreme Court has not ruled on this question, it is possible that a Georgia local government may now operate a civil service system or administrative hearing process that lacks subpoena power with more confidence than ever before.[512] Even if a future court declares a system invalid for lack of subpoena power due to the elastic and flexible nature of due process, this decision could apply only prospectively. Moreover, a court would likely tie this decision directly to the facts of the situation to determine whether the employer gave the employee sufficient process.[513] Finally, the Georgia court system would need to address any alleged defect in process caused by a lack of subpoena power.

D. *Claims that Parties Could Have Litigated Below*

Practitioners can couple the *Travers* fact preclusion doctrine with the doctrine of res judicata so as to bar re-litigation of both claims and factual disputes. Pursuant to *Allen* and *Migra*, courts can bar claims in subsequent litigation that practitioners could have raised

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472 U.S. 511, 525 (1985); Nixon v. Fitzgerald, 457 U.S. 731, 742-43 (1982); Courson v. McMillian, 939 F.2d 1479, 1486 (11th Cir. 1991); Schopler v. Bliss, 903 F.2d 1373, 1377-78 (11th Cir. 1990); Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1508 (11th Cir. 1990); Hudgins v. City of Ashburn, 890 F.2d 396, 402 (11th Cir. 1989). The individual defendants utilized this avenue of appeal in *Travers*. *See Travers*, 323 F.3d at 1295.

508. 218 F.3d 712, 717 (7th Cir. 2000).

509. 73 F.3d 87, 92 (6th Cir. 1996).

510. 422 F.2d 21, 24-25 (3rd Cir. 1970).

511. *Travers*, 323 F.3d at 1297.

512. One can only theorize as to the method by which a plaintiff would seek to enforce an administrative subpoena issued to a third-party witness who refused to appear before the administrative tribunal, given that administrative tribunals generally do not have statutory powers of contempt.

513. *See* Gilbert v. Homar, 520 U.S. 924, 930 (1997).

below but did not.[514] However, this doctrine would only apply if the state court rendered the decision below or if a party appeals the decision by an administrative body.[515] In addition, all of the elements necessary to satisfy the doctrine of res judicata must be present. One should carefully scrutinize a case at the outset to determine whether collateral estoppel bars claims litigated below, whether fact preclusion bars re-litigation of facts determined below, and whether the doctrine of res judicata bars the re-litigation of claims that a party could have raised below but did not.

E. Benefits of the Travers *Decision*

Certain public policy benefits to the judicial system and its operation support the *Travers* decision.[516] The U.S. Supreme Court has been particularly active in pointing out the value of the public policy benefits underlying such doctrines as collateral estoppel, res judicata, and fact preclusion.[517] The U.S. Supreme Court in *Elliott* stated that "[w]e have previously recognized that it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity."[518] The Supreme Court listed the various public policy benefits of the fact preclusion doctrine in its decisions in *Elliott*, *Allen*, *Utah Construction*, and *Kremer*.[519] In *Elliott*, the Court described one of the public policy benefits as "enforce[ing] repose," stating:

> Thus, *Utah Construction*, which we subsequently approved in *Kremer v. Chemical Construction Co.*, teaches that giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing

514. Migra v. Warren City of Dist. Bd. of Educ., 465 U.S. 75, 84 (1984); Allen v. McCurry, 449 U.S. 90, 92 (1980).

515. *Migra*, 465 U.S. at 84; *Allen*, 449 U.S. at 92.

516. *See generally* Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003).

517. *See, e.g.*, Univ. of Tenn. v. Elliott, 478 U.S. 788, 797 (1986) (recognizing the benefits of issue preclusion to fact finding of administrative bodies).

518. *Id.*

519. *See id.* at 797; Kremer v. Chem. Constr. Co., 456 U.S. 461, 478 (1982); Allen v. McCurry, 449 U.S. 90, 94-95 (1980); *Utah Constr. & Mining Co.*, 384 U.S. at 421 n.18.

> repose. This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, equally implicated whether factfinding is done by a federal or state agency.[520]

The Court also quoted a treatise that further elaborated this point:

> As one respected authority on administrative law has observed: "The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm—something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once. The principle is as much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions—a very great extent—the law worked out for courts does and should apply to agencies."[521]

Moreover, the court in *Elliott* also pointed out that fact preclusion serves federalism because fact preclusion reinforces the policies underlying the Full Faith and Credit Clause—a provision with a major purpose being to act as a nationally unifying force.[522]

In *Allen v. McCurry*,[523] the Supreme Court recognized that collateral estoppel and res judicata relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication by preventing inconsistent decisions.[524] The *Allen* Court also pointed out that the doctrines of "res judicata and collateral estoppel . . . promote the comity between

520. *Elliott*, 478 U.S. at 798 (citations omitted).
521. *See id.* (quoting 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.9, at 78 (2d ed. 1983)).
522. *See id.* (citing Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980)).
523. 449 U.S. 90 (1980).
524. *Id.* at 94 (citing Montana v. United States, 440 U.S. 147, 153-154 (1979)).

state and federal courts that has been recognized as a bulwark of the federal system."[525]

Because the Supreme Court has repeatedly affirmed the public policy benefits underlying the doctrines of res judicata, collateral estoppel, and fact preclusion, it is likely that these doctrines will continue to play a prominent role in federal litigation in the foreseeable future.

III. POST-*TRAVERS* RECOMMENDATIONS

The impact of the *Travers* decision should increase the importance of administrative hearings held in the Eleventh Circuit. However, it is difficult to predict whether there will be fewer administrative hearings in the future. Both public sector employers and employees should take the administrative hearing process more seriously following the *Travers* decision because more is at stake in each hearing. The following are some recommendations for employee-plaintiffs and employers for avoiding problems with the *Travers* decision, for making full use of the doctrine of fact preclusion, or for both. These recommendations are most suited for civil service and due process hearings for employees but applicable in other contexts.

A. Plaintiff-Employee Recommendations

Plaintiff-employees may wish to take advantage of the *Travers* fact preclusion doctrine but will more often be looking to avoid its effects. Prior to *Travers* a plaintiff could pursue a civil service appeal with little or no risk if he did not file an appeal in court, but after *Travers*, even a ruling by an administrative body that a plaintiff does not appeal can be risky for the plaintiff.[526] In particular, factual issues determined against the employee can preclude further litigation on those factual issues in any subsequent suit.[527]

525. *Id.* at 95-96 (citing Younger v. Harris, 401 U.S. 37, 43-45 (1971)).
526. *See* Travers v. Jones, 323 F.3d 1204, 1296 (11th Cir. 2003).
527. *See id.*

The first decision a plaintiff faces is whether to seek an administrative appeal at all. Employees should familiarize themselves with the administrative processes of their public sector employers. They should, if possible, obtain information concerning the percentage of similar cases determined by the administrative body in favor of employees. Plaintiffs must carefully weigh whether an administrative body might rule in their favor or whether it would likely cement the employer's case against them. Moreover, because factual determinations may be preclusive in subsequent Section 1983 litigation, an employee should, in considering whether to file an administrative appeal, take into account his or her desire to file subsequent Section 1983 litigation in federal court. Conversely, an employee should be aware that, if he wins an administrative appeal, courts could use *Travers* to preclude the employer's defenses in subsequent Section 1983 litigation, depending, of course, on whether the hearing process satisfies the necessary elements.[528] Both plaintiffs and defendants should pay close attention to the standard of review for the administrative hearings as expressed in the rules and policies applicable to the administrative hearings. Employers should determine whether the standard of review lends itself to support factual preclusion of the claims the employee wishes to later bring forth in court. The standard of review was one of the main reasons that the *Travers* court granted preclusive effect to the DeKalb Merit System hearing.[529]

Another major decision for a plaintiff to make is whether to appeal an adverse decision by an administrative body to the superior court via certiorari. These appeals generally are not a good idea unless there is a clear lack of any evidence supporting the administrative body's decision or unless the administrative body committed a clear legal error. The risks in appealing to superior court are threefold: (1) the standard of review is very high in certiorari appeals and courts generally disfavor these appeals in the employment context; (2) res judicata, collateral estoppel, or both may bar Title VII and

528. *See id.* at 1296-97.
529. *Id.* at 1296.

discrimination claims under certain circumstances; and (3) res judicata, collateral estoppel, or both may bar Section 1983 claims and claims which plaintiffs could have asserted in a certiorari action. In short, appeal via certiorari is not an attractive option for a plaintiff who loses an administrative appeal.

The other alternative for plaintiffs who believe that a local government agency violated their constitutional rights is to file suit against the decision-maker in his or her individual capacity under Section 1983.[530] As discussed above, the Eleventh Circuit's interpretation of the Supreme Court's decision in *Monell* precludes suit against the local governmental entity for employment decisions if the employee has an opportunity to appeal.[531] Moreover, it does a plaintiff no good to file suit against the decision-maker in his or her official capacity because these suits are, in reality, suits against the governmental entity and are thus also barred.[532] Therefore, the only alternative is to file suit against the decision-maker in his or her individual capacity.

Restrictions on the payment of claims on behalf of employees imposed by many governmental bodies can also limit suits against decision-makers in their individual capacities in employment actions. Plaintiffs have to make the choice between accepting a modest settlement paid by the governmental entity consistent with its self-imposed limitations or, alternatively, continuing the lawsuit against the decision-maker individually and hoping that the individual defendant has sufficient assets to satisfy a judgment larger than the settlement offered by the governmental body. A governmental body can also completely refuse to defend and indemnify a decision-maker under some circumstances, including those in which the decision-maker violated policies.

After *Travers*, plaintiffs face important decisions concerning their appeals and subsequent suits in a short window of time.[533] They must

530. *See* Scala v. City of Winter Park, 116 F.3d 1396, 1401 (11th Cir. 1997).

531. *See supra* notes 480-90 and accompanying text.

532. *See* Kentucky v. Graham, 473 U.S. 159, 165-67 (1985); Free v. Granger, 887 F.2d 1552, 1557 (11th Cir. 1989).

533. Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003).

make these decisions carefully, considering all relevant information and the potential for the court barring subsequent claims.[534]

B. Defendant-Employer Recommendations

After *Travers*, public sector employers with civil service systems face some new challenges which, if met, could provide significant advantages in subsequent Section 1983 litigation and cut down on repetitive litigation.[535]

First, public sector employers should review their civil service staffing in depth. They should determine whether hearing officers, administrative bodies, or both are making decisions that are consistent with the law and facts in the cases presented to them. If not, employers should make staffing changes to avoid liability to employees in subsequent Section 1983 litigation based upon precluded facts. A thoughtful administrative body issuing a decision adverse to a governmental entity can draft an opinion that avoids fact preclusion on issues of immediate liability for the governmental body. Conversely, changes in staff to assure compliance with the law and facts of cases can also lead to fact preclusion in cases won by employers and thus cut down on unnecessary litigation and discovery.

Second, public sector employers should review their civil service processes. Following *Travers*, a civil service administrative body need not issue subpoenas to potential witnesses. Litigants can misuse the subpoena process in administrative settings, adding to the workload of government employees and inconveniencing subpoenaed non-employee citizens. If a governmental body desires to continue issuing subpoenas, it can decide to restrict its subpoenas to current employees of that governmental unit.[536]

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534. *See id.*

535. *See generally id.*

536. Practitioners in this area of the law have long questioned whether subpoenas issued by administrative bodies in Georgia are enforceable. The subpoena power is often derived from local legislation or from ordinances or policies providing for the issuance of subpoenas. Practitioners have often questioned whether administrative bodies, such as civil service boards, have the power to subpoena witnesses or whether the subpoena power rests with the court system. From a practical

Governments should also closely examine the standard of review for administrative bodies. The ultimate goal of all administrative hearings should be to render due process. However, DeKalb County's Merit System appeal process does not grant hearing officers unfettered discretion to overturn the county's employment decisions. A hearing officer can only overturn an employment decision of the county if the county based the decision upon an error of fact or motivated by a non-job related factor.[537] A government body utilizing this standard of review in its civil service system can effectively argue that an administrative body's finding in its favor factually precludes non-job related factors, such as the exercise of First Amendment rights by the employee, from being the cause of the employment decision in question. By using the *Travers* fact preclusion doctrine in this manner, a governmental body could either gain early dismissal of a Section 1983 case or it might greatly limit the issues in a given Section 1983 case, leading to less time and expense in discovery and in litigation.[538]

Finally, the captions in all civil service hearings should include both the governmental body and the decision-maker. By including both the decision-making supervisor and the governmental body, a governmental agency has a better chance of avoiding the problems noted by the Eleventh Circuit in *Quinn*, thus making the best use of the doctrines of res judicata, collateral estoppel, and fact preclusion on behalf of itself and the decision-maker.[539]

CONCLUSION

The *Travers* decision benefits litigants, the court system, and society by encouraging uniform court results, restricting unnecessary litigation, streamlining the judicial process, and encouraging

standpoint, enforcement of administrative subpoenas is problematic, particularly against private citizens who refuse to appear before the court.

537. *See id.*

538. *See generally* Travers v. Jones, 323 F.3d 1294 (11th Cir. 2003).

539. *See* Quinn v. Monroe County, 330 F.3d 1320, 1330 (11th Cir. 2003). Practitioners should consider whether this practice requires the consent of the decision-maker, creates a potential conflict of interest should the decision-maker wish not to be included in the caption, or does both.

federalism. It does, however, present some unique issues for governmental bodies that employ administrative civil service systems. If a governmental body addresses the issues presented by the *Travers* decision, it will likely benefit from the decision by facing less duplicative litigation. For employees, the decision limits options in seeking redress of constitutional violations and prevents both overlapping litigation and attempts to have "two bites at the apple."